PETITION FOR WRIT OF CERTIORARI

NO. 09-

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2009

CLIFTON TERELLE McNEIL,	)
Petitioner,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
Respondent.	)

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, by and through undersigned counsel, asks leave to file a Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39 of the Supreme Court Rules. Counsel was appointed in the lower court pursuant to 18 U.S.C. § 3006.

This the 2nd day of July, 2010.

Respectfully submitted,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

The Armed Career Criminal Act (ACCA) applies to a person who "violates section 922(g)" and "has three previous convictions . . . for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). A "serious drug offense" is defined in relevant part as "an offense under State law . . . for which a maximum term of imprisonment of ten years or more *is prescribed by law*." § 924(e)(2)(A)(ii) (emphasis added).

The Fourth Circuit Court of Appeals affirmed the district court's classification of Petitioner's North Carolina drug offenses as "serious drug offenses" under ACCA, even though at the time of Petitioner's federal sentencing, North Carolina's current sentencing law did not prescribe a maximum term of imprisonment of at least ten years for those state drug offenses. The Fourth Circuit held that since North Carolina did not apply its current sentencing law retroactively, the fact that Petitioner's drug offenses were punishable by imprisonment for at least ten years under the version of the law in effect at the time he committed these offenses qualified them as "serious drug offenses" under ACCA.

The question presented is:

> Whether the plain meaning of "is prescribed by law" which ACCA uses to define a predicate "serious drug offense" requires a federal sentencing court to look to the maximum penalty prescribed by current state law for a drug offense at the time of the instant federal offense, regardless of whether the state has made that current sentencing law retroactive.

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United States of America

Clifton Terelle McNeill

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit rendered in this case on March 8, 2010.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence is reported at 598 F.3d 161. App. 1, *infra*.

JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence issued on March 8, 2010. App. 1, *infra*. On March 22, 2010, Petitioner submitted a request for rehearing and rehearing *en banc* which the Fourth Circuit Court of Appeals denied on April 5, 2010. App. 2, *infra*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act's ("ACCA") sentencing penalties apply "[i]n the case of a person who ***violates*** section 922(g) of this title and ***has*** three previous convictions . . . for a violent felony or a serious drug offense . . .." 18 U.S.C. § 924(e)(1) (emphasis added).

ACCA defines a "serious drug offense" in pertinent part as: "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more ***is prescribed by law***." § 924(e)(2)(A)(ii) (emphasis added).

STATEMENT OF THE CASE

This case began on February 28, 2007, when police officers from Fayetteville, North Carolina arrested Petitioner following a traffic stop he initially eluded. During the arrest and search incident to that arrest, police found a firearm and 3.1 grams of cocaine base. Based on this incident, on May 22, 2008, a federal grand jury sitting in the Eastern District of North Carolina returned a three-count indictment that charged Petitioner with unlawful possession of a firearm by a felon, 18 U.S.C. § 922(g)(1), (Count I); possession with intent to distribute a quantity of cocaine base, 21 U.S.C. § 841(a)(1), (Count II); and possession of a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c), (Count III). On August 18, 2008, Petitioner pleaded guilty to Counts I and II, pursuant to a plea agreement that called for dismissal of Count III at sentencing.

On January 13, 2009, the district court sentenced Petitioner to imprisonment for concurrent terms of 300 months on Count I and 240 months on Count II. The sentence for Count I reflected a designation of Petitioner as an armed career criminal and an upward departure above the armed career criminal range of 188 to 235 months' imprisonment. The district court found that Petitioner qualified for the Armed Career Criminal Act (ACCA) enhancement of 18 U.S.C. § 924(e) based on Petitioner's 1995 North Carolina convictions for common law robbery and felony assault, and five North Carolina Class H felony convictions from 1992 and 1995 for sale of cocaine and possession of cocaine for sale. Petitioner objected to reliance upon these five Class H drug felonies as ACCA predicates, an objection the court over-ruled. Petitioner timely appealed on January 13, 2009.

On appeal, Petitioner contended the district court erred in sentencing him as an armed career criminal.[1] Specifically, the district court erred by concluding Petitioner's 1992 and 1995 North Carolina Class H felony drug convictions were "serious drug offenses" because at the time of his federal sentencing those drug offenses were no longer punishable by a term of imprisonment of at least ten years under North Carolina's current sentencing law.

North Carolina's Structured Sentencing Act ("Structured Sentencing"), which became law on October 1, 1994, reduced the statutory maximum term of imprisonment for all Class H Felony drug offenses from ten years to thirty months. *See* N.C. Gen. St. §§ 15A-1340.4 (1993), 15A-1340.10, *et seq.*[2] North Carolina did not make Structured Sentencing retroactive; thus, the reduced Class H penalties only apply to the commission of a Class H drug felony on or after October 1, 1994. *See* N.C. Gen. St. § 15A-1340.10.

Petitioner contended the plain meaning of the phrase "is prescribed by law" within ACCA's "serious drug offense" definition required a federal sentencing court to look to the maximum penalty in effect at the time of the defendant's federal sentencing hearing, rather than the sentencing law in effect at the time of the state conviction, as the district court concluded. In support, Petitioner relied upon *United States v. Darden*, 539 F.3d 116 (2nd Cir. 2008), and *United States v. Morton*, 17 F.3d 911 (6th Cir. 1994). Both the Second and Sixth Circuits

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[1] Petitioner also challenged the procedural and substantive reasonableness of the district court's upward departure, a challenge the Fourth Circuit rejected, *see* App. 1 at 7-10. This petition does not seek review of that issue.

[2] The Fourth Circuit mistakenly stated twenty-five months was the maximum term of imprisonment for a Class H Felony at the highest criminal history level. App. 1 at 4. However, the correct amount is thirty months. *See* N.C. Gen. St. §§ 15A-1340.17(c),(d) (setting twenty-five months as the highest minimum term for a Class H felony and thirty months as the highest corresponding maximum).

concluded the phrase "is prescribed by law" required a focus upon the maximum term of imprisonment for an offense under current state law at the time of the federal sentencing. *Darden*, 539 F.3d at 122, 127; *Morton*, 17 F.3d at 915. Both also concluded that the Rule of Lenity required a resolution of any residual doubts regarding the application of the phrase "is prescribed by law" in favor of focusing upon a state's current sentencing law for an offense, not the old law in place at the time of the conduct underlying the previous conviction for that state offense. *Darden*, 539 F.3d at 128; *Morton*, 17 F.3d at 915.

The Fourth Circuit rejected the position of the Second and Sixth Circuits, and instead sided with the Fifth Circuit's decision from *United States v. Hinojosa*, 349 F.3d 200 (5th Cir. 2003). App. 1 at 5-6. The court below concluded that since North Carolina did not make Structured Sentencing retroactive, "North Carolina has two sentencing schemes – one governing offenses before . . . and another governing offenses committed after" the effective date of Structured Sentencing. *Id.* at 6. The Fourth Circuit stated, "McNeill's previous felony drug convictions were punishable by a maximum term of imprisonment of at least ten years both at the time he committed the offenses and at the time of his federal sentencing." *Id.* The court concluded, "McNeill was properly sentenced as an armed career criminal." *Id.* at 7.

On March 22, 2010, Petitioner filed a petition for rehearing and for rehearing *en banc*. The Fourth Circuit denied this petition on April 5, 2010. App. 2, *infra*.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question of whether the plain meaning of ACCA's "serious drug offense" definition – specifically, the phrase "an offense under State law . . . for which a maximum term of

imprisonment of at least ten years is prescribed by law" requires a focus upon a state's current statutory maximum for an offense at the time of federal sentencing was presented to the Fourth Circuit Court of Appeals. The Fourth Circuit rejected Petitioner's contention that his North Carolina drug offenses were not "serious drug offenses" at the time of the instant federal offense because North Carolina's current sentencing law did not prescribe a maximum penalty of at least ten years for those state offenses. Thus, the federal claim was properly presented and reviewed below and is appropriate for this Court's consideration. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits the writ should issue because the Fourth Circuit Court of Appeals has "entered a decision in conflict with the decision" of two other United States circuit courts of appeals, S. Ct. R. 10(a). The question presented has not only divided the four circuit courts to address this issue, it is "an important question of federal law that has not been, but should be, settled by this Court . . .." S. Ct. R. 10(c). Finally, the Fourth Circuit's application of ACCA's "serious drug offense" definition contravenes this Court's established precedent for interpretation of criminal statutes. S. Ct. R. 10(c).

A. The Fourth Circuit's Application Of The Phrase "Is Prescribed by Law" Conflicts With The Second and Sixth Circuits' Construction Of ACCA's "Serious Drug Offense" Definition.

This Court should grant review to resolve a circuit split over the proper interpretation of the phrase "is prescribed by law" which comprises the temporal imprisonment standard for ACCA's definition of a "serious drug offense." S. Ct. R. 10(a). The Fourth Circuit, in Petitioner's case, and the Fifth Circuit, in *Hinojosa*, held that if the state did not make its current sentencing law retroactive, then a federal sentencing court should look to the state law in effect at

time of the predicate conviction and not the state law in effect at the time of federal sentencing. App. 1 at 6; *Hinojosa*, 349 F.3d at 205. These two decisions conflict with the Second and Sixth Circuits, which both hold the plain meaning of the phrase "is prescribed by law" requires a federal sentencing court to look to a state's current sentencing law to determine whether a prior state drug offense is a "serious drug offense" under ACCA. *Darden*, 539 F.3d at 128; *Morton*, 17 F.3d at 915.

The question presented has not only divided four circuit courts, it remains a latent issue in at least one other circuit. Within the Third Circuit Court of Appeals, Delaware has reduced the statutory maximum penalties for certain drug crimes to below ten years. *Compare* 16 Del. C. § 4751 (2010) *with* 16 Del. C. § 4751 (1987). Moreover, the issue of how to apply ACCA's definition of a "serious drug offense" will also confront the remaining circuit courts when a person faces sentencing for a § 922(g) violation within one of those remaining circuits and has one or more of the exact same state drug offenses as those at issue from the Second Circuit in *Darden* (New York), the Fourth Circuit in *McNeill* (North Carolina), the Fifth Circuit in *Hinojosa* (Texas), or the Sixth Circuit in *Morton* (Tennessee). For a person who faces sentencing in a circuit that follows the Second and Sixth Circuits, that offense will not count as an ACCA predicate. If another person, with the exact same offense of conviction as the first person – even the same date of offense – faces sentencing in a circuit that follows the Fourth and Fifth Circuits, that same offense will count as an ACCA predicate.

Thus, this Court's timely resolution will not only prevent expansion of the existing circuit split, it will also prevent the arbitrary imposition of ACCA's severe penalties among all the circuit courts for defendants with the exact same predicate convictions. Without such resolution,

the lack of a uniform federal standard for applying the "serious drug offense" definition will facilitate the further spread of arbitrary imposition of ACCA sentences.

B. This Court Has Not Yet Addressed This Important Issue Of Federal Law Which Has Divided Four Circuit Courts Of Appeals.

The absence of a uniform federal standard for applying ACCA's "serious drug offense" definition presents an important question of federal law this Court has not yet addressed. S. Ct. R. 10(c). This Court's resolution of the circuits' conflicting applications is especially crucial, considering the severe increase in statutory penalties mandated by ACCA: a mandatory minimum fifteen-year imprisonment term and an increase in the maximum term from ten years to life imprisonment. § 924(e)(1).

In light of ACCA's severe sentencing implications, this Court should grant certiorari to resolve a circuit split that hinges upon an interpretation of ACCA, as this Court has on several previous occasions. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575 (1990) (establishing uniform federal standard for "burglary"); *Custis v. United States*, 511 U.S. 485, 490 (1994) (granting review to resolve circuit split over the extent to which ACCA permits collateral challenges to predicate convictions); *Logan v. United States*, 552 U.S. 23, 30 (2007) (resolving circuit split over whether a conviction which does not trigger a loss of civil rights nonetheless qualifies as an ACCA predicate); *United States v. Rodriquez*, 553 U.S. 377, 382 (2008) (resolving circuit split over whether recidivist enhancements factor into the "maximum term of imprisonment" inquiry for purposes of ACCA's "serious drug offense" determination).

C. The Fourth Circuit's Application of ACCA's "Serious Drug Offense" Definition Contravenes This Court's Established Precedent For Interpretation of Criminal Statutes.

The Fourth Circuit's application of ACCA's "serious drug offense" definition is wrong for four reasons; it: (1) distorts the plain meaning of the phrase "is prescribed by law"; (2) disregards ACCA's focus upon the instant felon-in-possession offense; (3) shifts the focus of the "serious drug offense" standard from the current state sentencing law for an "offense" to the timing of the offense conduct and an administrative decision regarding retroactivity of the state's current sentencing law; and (4) fails to apply the Rule of Lenity.

First, the Fourth Circuit's interpretation of ACCA's "serious drug offense" definition contravenes this Court's precedent requiring fidelity to the plain meaning of a statute. In accordance with this "cardinal canon" of statutory interpretation, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Specifically, the Fourth Circuit distorts the plain meaning of the phrase "is prescribed by law."

Here, Congress stated: "the term 'serious drug offense' *means* . . . an offense under State law . . . for which a maximum term of imprisonment of ten years of more *is prescribed by law*," § 924(e)(2)(A)(ii) (emphasis added). Use of the word "means" and the phrase "is prescribed" necessarily confines the "serious drug offense" inquiry to a state's current sentencing law at the time of the federal offense. *See Burgess v. United States*, 553 U.S. 124, 130 (2008) ("As a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated.") (internal quotation marks and citation omitted).

Congress did not use the phrase "is or was prescribed," as the Fourth Circuit's application would require. *See United States v. Wilson*, 503 U.S. 329, 333 (1992) (emphasizing, "Congress' use of a verb tense is significant in construing statutes"); *Carr v. United States*, 130 S. Ct. 2229 2010 WL 2160783, **7-8 (2010) ("[W]e have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach."); *G.R. Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 117 (1983) (superseded in part by 18 U.S.C. § 921(a)(20)) (noting, "Congress carefully distinguished between present status and a past event" by use of the present and present perfect tenses in section 922).

Had Congress intended "is prescribed" to mean "is or was prescribed," it could have defined the temporal punishment component of a "serious drug offense" the same as a "violent felony" – "any crime punishable by imprisonment for a term exceeding [ten] years," § 924(e)(2)(B). However, Congress did not employ "crime punishable by," a temporally elastic phrase sufficiently ambiguous to permit the Fourth and Fifth Circuits' transformation of "is" to "was." *See Barrett v. United States*, 423 U.S. 212, 216-217 (1976) (emphasizing, "Congress knew the significance and meaning of the language it employed" in section 922). Rather, Congress chose a different phrase – "is prescribed by law" – and fidelity to this Court's plain meaning jurisprudence compels the conclusion that Congress meant what it said: "is" means "is."

Second, the Fourth Circuit's reliance upon an old, repealed sentencing law not only distorts the plain meaning of "is prescribed by law," it disregards ACCA's focus upon penalizing the instant felon-in-possession offense. ACCA applies to a person "who *violates* section 922(g)" and "*has*" three qualifying offenses, § 924(e)(1) (emphasis added). Use of the present tense words "violates" and "has" squarely places ACCA's focus on the status of a prior drug offense at

the time of the instant federal offense, not on the past status of that state offense. *Carr*, 130 S. Ct. at __, 2010 WL 2160783, *8 (recognizing that "a statute's undeviating use of the present tense is a striking indicator of its prospective orientation") (internal quotations and citation omitted). As this Court emphasized in *Rodriquez*, "when a defendant is given a higher sentence under a recidivism statute . . . 100% of the punishment is for the offense of conviction." 553 U.S. at 386.

In addition to Congress' consistent use of the present tense in ACCA and in the "serious drug offense" definition, Congress further demonstrated the intent to focus the ACCA determination at the time of federal sentencing by excluding from ACCA's scope, "[a]ny conviction which has been expunged, or set aside, or for which a person has been pardoned." § 921(a)(20). So long as the pardon or expungement does not expressly prohibit firearms possession, such a conviction cannot serve as violent felony under ACCA. *See id.* (applying pardon and expungement exclusion to "crime punishable by imprisonment for a term exceeding one year" as used in Title 18, Chapter 44, which encompasses § 924(e)).

Section 921(a)(20)'s exclusion of pardoned or expunged convictions from ACCA's scope demonstrates Congress intended the current status of a prior offense at the time of federal sentencing should determine whether that offense qualifies as an ACCA predicate. In fact, Congress added the expunged conviction exclusion to § 921(a)(20) in response to *Dickerson*, which had concluded a state's expungement of a conviction did not remove that conviction from § 922's scope. 460 U.S. at 115-17. *Caron v. United States*, 524 U.S. 308, 313 (1998) (noting, "Congress modified this aspect of *Dickerson*," via this addition to § 921(a)(20)). Thus, regardless of whether a prior offense qualified as an ACCA predicate at some point in the past (prior to a pardon or expungement), ACCA's focus is on the qualifying status of an offense at the time of

federal sentencing. Similarly, reliance upon a state's current statutory maximum for a drug offense at the time of federal sentencing maintains fidelity to ACCA's focus upon the present status of an offense at the time of federal sentencing.

Third, the Fourth Circuit's distortion of ACCA's plain meaning and disregard of ACCA's focus on the present status of an offense shifts the "serious drug offense" standard from the "offense" of conviction to the impact an administrative decision whether to make a sentencing law retroactive has upon a particular defendant. As the Second Circuit explained thoroughly in *Darden*, "the key statutory terms [of the "serious drug offense" definition] are 'offense,' 'law' and 'maximum term.'" 539 F.3d at 124. Relying on this Court's opinion in the case of *Rodriquez*, the Second Circuit emphasized, "in *Rodriquez*, the Supreme Court explained that an 'offense' simply means the violation of a governing criminal statute." *Id.* (citing *Rodriquez*, 553 U.S. at 382). Here, as in *Darden*, the North Carolina governing law defining a Class H drug felony did not change in any meaningful way between the time Petitioner committed those felonies and when the district court sentenced him in the instant case.[3] *See Darden*, 539 F.3d at 124 (noting, "the New York statutes defining the offense conduct, and setting out the felony classifications, have not been meaningfully amended since the state convictions").

Rather than focus upon the essential elements of the offense conduct, the Fourth Circuit, like the Fifth Circuit in *Hinojosa*, 349 F.3d at 205, shifts the focus from the statutory elements of the offense to the timing of the offense conduct and a state legislature's decision whether to retroactively apply sentencing reform. However, here, as in *Darden*, which addressed New

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[3] *Compare* N.C. Gen. St. §§ 90-95(a)(1), (b)(1) (Michie 1993), *with* §§ 90-95(a)(1), (b)(1) (West 2008) (classifying possession with intent to distribute a controlled substance as a Class H Felony).

York's non-retroactive sentencing reform, "there is no reason to believe that the non-retroactivity decision . . . reflects a state legislative view" that pre-Structured Sentencing offenses "were categorically more serious than those taking place after [Structured Sentencing]." *Darden*, 539 F.3d at 127. This is because the decision to make a sentencing change retroactive or not derives from administrative factors in the state's criminal justice system. *See id.* at 126 (concluding, "the non-retroactivity provision was almost surely enacted to combat problems of retroactive administration"). In North Carolina, this same administrative motive for not making Structured Sentencing retroactive is evident by the fact that the legislature advanced its effective date from January 1, 1995 to October 1, 1994, as part of an appropriations bill. *See* N.C. Gen. St. § 15A-1340.10, as amended by Ex. Sess., c. 24, § 14(b) (S.B. 150), eff. March 21, 1994. The fact that administrative concerns determined Structured Sentencing's effective date dispels as unreasonable any assumption that the effective date or retroactivity determination reflects North Carolina's normative judgment regarding the seriousness of an offense.

To further demonstrate the unreasonableness of relying upon the retroactivity of a particular state's current sentencing laws, it merits note that Delaware's sentencing reform laws permit the individual facing sentencing for crimes committed before the current law's effective date to choose between the old law and the current law. 11 Del. C. § 4216(d) ("Any individual convicted of a crime on or after January 1, 1990, which crime occurred prior to June 30, 1990, may elect to be sentenced under the provisions of the Truth in Sentencing Act of 1989 rather than under the prior provisions of this title."). Similar to an administrative decision to establish the effective date of a state's current sentencing law, Delaware's choice to permit a person with a drug offense to choose between the old law and the current law does not reflect that state's

current normative judgment regarding the seriousness of a drug offense. Rather, the current statutory maximum set forth in the current law represents the state's present normative judgment regarding the qualitative seriousness of an offense.

Moreover, North Carolina's decision not to make Structured Sentencing retroactive does not mean, as the Fourth Circuit asserted, "North Carolina has two sentencing schemes." App. 1 at 6. Even the Fourth Circuit acknowledged the old North Carolina sentencing laws it relied upon to categorize Petitioner's North Carolina Class H felonies as ACCA predicates were "repealed" in 1993. *Id.* at 4 (citing, "N.C. Gen. St. § 15A-1340.1, *et seq.* (repealed 1993); N.C. Gen. St. § 14-1.1 (repealed 1993)"). As the Second Circuit emphasized, the old law, regardless of whether certain persons remain subject to it, is still old law. *See Darden*, 539 F.3d at 128 ("That a dwindling class of offenders may still be subject to the 'Old Law' does not alter the fact that it is the old law.") (internal quotations and citation omitted).

The Fourth Circuit's reliance upon the penalties under an old, repealed law to make the ACCA "serious drug offense" determination also fosters a logical contradiction and yields arbitrary results. The exact same predicate offense, in this case a Class H drug felony, will be considered a "serious drug offense" for a federal defendant who committed that drug felony just one day before the effective date of Structured Sentencing, but not for another federal defendant who committed the same Class H drug felony one day after Structured Sentencing's effective date. So, regardless of whether both defendants possessed a firearm on the same day and face federal sentencing on the same day before the same district court, that court will have to conclude that a Class H felony drug offense both "is" and "is not" a "serious drug offense." This result not only embodies a logical contradiction, it also unfairly creates an arbitrary distinction based upon

a fact irrelevant to any common-sense notion of seriousness or to the substantive elements of an offense. *See Darden*, 539 F.3d at 126 (reasoning, "the timing of the offense conduct" does not make a drug crime "more or less serious").

Fourth and finally, the Fourth Circuit failed to address and explain its rejection of Petitioner's contention at oral argument that the Rule of Lenity should apply to resolve any ambiguities within ACCA's "serious drug offense" definition in Petitioner's favor. As noted at oral argument, both the Second Circuit in *Darden*, and the Sixth Circuit in *Morton*, concluded this canon of statutory interpretation required resolution in favor of the interpretation which the plain meaning of the statute strongly supported. *See Darden*, 539 F.3d at 128 (concluding, "if any ambiguity remained . . . and there being a strong argument to interpret the statute in the way we do, we would apply the rule of lenity to reach the same conclusion"); *Morton*, 17 F.3d at 915 ("The question is at least ambiguous and therefore, under the rule of lenity, should be resolved in defendant's favor.") (citing *United States v. Bass*, 404 U.S. 336, 348 (1971) ("Where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.")).

Even if the Fourth Circuit's grammatical contortions with the phrase "is prescribed" and disregard of ACCA's focus upon the present federal offense arguably yield a permissible interpretation of ACCA's "serious drug offense" definition, the existing circuit split itself demonstrates there are at least two plausible interpretations for that definition. Given this statutory ambiguity and in light of ACCA's draconian impact upon sentencing penalties, the Fourth Circuit should have applied the Rule of Lenity to resolve the ACCA "serious drug offense" issue in Petitioner's favor. *Bass*, 404 U.S. at 348.

The Fourth Circuit's failure to apply or to even mention the Rule of Lenity also demonstrates the applicability of the rule. *Bifulco v. United States*, 447 U.S. 381, 402 (1980) ("That it would be extremely difficult to accept the Government's argument that Congress unambiguously intended a contrary result, however, is best evidenced by the fact that the rule of lenity is not mentioned, let alone applied, in any of the lower court opinions that have accepted the Government's position.").

In sum, North Carolina's current normative judgment of the seriousness of a Class H Felony – and its normative judgment since October 1, 1994 – is set forth in the penalties which Structured Sentencing prescribes, a maximum term of imprisonment of thirty months. Fidelity to the plain meaning of the phrase "is prescribed by law" and to ACCA's focus upon the status of a prior "offense" at the time of federal sentencing compels the interpretation of the "serious drug offense" definition which the Fourth Circuit rejected – the maximum penalty prescribed by current state law for an offense.

CONCLUSION

For each of the foregoing reasons, Petitioner respectfully requests a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

This the 2nd day of July, 2010.

Respectfully submitted,

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OPPOSITION BRIEF

No. 10-5258

IN THE SUPREME COURT OF THE UNITED STATES

CLINTON TERELLE McNEILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in determining whether a prior state offense is one "for which a maximum term of imprisonment of ten years or more is prescribed by law" for purposes of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B), a court should consider the maximum term prescribed by state law for petitioner's prior offense or instead should consider the maximum term that state law would prescribe for that offense if the offense were committed on the date of petitioner's federal sentencing.

IN THE SUPREME COURT OF THE UNITED STATES

No. 10-5258

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 598 F.3d 161.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2010. A petition for rehearing was denied on April 5, 2010 (Pet. App. 11a). The petition for a writ of certiorari was filed on July 2, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); and one count of possession with intent to distribute crack cocaine, in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioner to 300 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-10a.

1. On February 28, 2007, officers with the Fayetteville, North Carolina, Police Department tried to stop petitioner's vehicle for running a red light. Petitioner evaded the police for several miles. He then made an abrupt stop and fled from his vehicle. An officer tackled petitioner and found a .38 caliber Smith & Wesson revolver under petitioner's body. A search of petitioner uncovered 3.1 grams of crack cocaine, packaged for distribution, along with $369. Pet. App. 2a.

2. Petitioner pleaded guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); and one count of possession with intent to distribute crack cocaine, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a-3a. On the former count, petitioner was subject to a mandatory minimum sentence of 15 years under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), if he had "three previous convictions

* * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). The Act defines a "serious drug offense" in relevant part as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii).

At the sentencing hearing, petitioner did not dispute that two of his prior convictions under North Carolina law for assault with a deadly weapon and common law robbery qualified as "violent felon[ies]" for ACCA purposes. Pet. App. 3a n.1. Petitioner did dispute, however, that additional prior convictions under North Carolina law qualified as "serious drug offense[s]" for ACCA purposes, including his convictions in November 1992 and April 1995 for possession with the intent to distribute cocaine. Id. at 4a; see C.A. App. 122, 124.[1] Petitioner argued that, under North Carolina law, the offense of possession with intent to distribute cocaine is not punishable by "a maximum term of imprisonment of ten years or more." 18 U.S.C. 924(e)(2)(A)(ii); see Pet. App. 4a.

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[1] Petitioner was convicted of several drug offenses under North Carolina law between 1991 and 2004. See C.A. App. 121-125. The court of appeals focused on petitioner's convictions in November 1992 and April 1995 for possession with the intent to distribute cocaine. Pet. App. 4a. Petitioner does not contend that, of his various drug convictions, any should be treated differently for ACCA purposes.

Under North Carolina law, petitioner's drug offenses are Class H felonies. When petitioner committed those offenses in 1992 and 1994, they were punishable by a maximum term of imprisonment of ten years. See Pet. App. 4a (citing N.C. Gen. Stat. § 14-1.1 (repealed 1993), and N.C. Gen. Stat. § 15A-1340.1 et seq. (repealed 1993)). North Carolina subsequently revised its sentencing laws, and Class H felonies are now punishable by a maximum term of imprisonment of 30 months. See Pet. 4; N.C. Gen. Stat. § 15A-1340.17; State v. Mullaney, 500 S.E. 2d 112, 114 (N.C. Ct. App. 1998) ("Under Structured Sentencing, the maximum possible term of imprisonment for a Class H felony is thirty months."). North Carolina did not, however, make the sentencing change retroactive. The reduced Class H penalties apply only to offenses committed on or after October 1, 1994, and petitioner committed his drug offenses in February 1992 and September 1994. See Pet. 4; C.A. App. 122, 124. Thus, under current North Carolina law, petitioner's drug offenses remain punishable by "a maximum term of imprisonment of ten years." 18 U.S.C. 924(e)(2)(A)(ii).

Before the district court, petitioner contended that when the ACCA defines a "serious drug offense" as one "for which a maximum term of imprisonment of ten years or more is prescribed by law," 18 U.S.C. 924(e)(2)(A)(ii) (emphasis added), it refers to the term of imprisonment prescribed by state law at the time of the federal sentencing -- not at the time of commission of the state offense.

C.A. App. 101-102. The district court rejected that contention and held that petitioner's prior convictions were for "serious drug offense[s]" under the ACCA. As a result, petitioner's advisory Guidelines range was 188 to 235 months of imprisonment (based on his criminal history category of VI and his total offense level of 31). Id. at 130. The district court varied upward from that range on the basis that petitioner's criminal history category of VI substantially underrepresented the seriousness of his criminal history and the likelihood of recidivism. Pet. App. 7a. The court sentenced petitioner to concurrent terms of imprisonment of 300 months on the count of being a felon in possession of a firearm and 240 months on the count of possession with intent to distribute crack cocaine. Ibid.

3. The court of appeals affirmed. Pet. App. 1a-10a. The court observed that "[w]hen North Carolina revised its sentencing scheme in 1994, it specifically provided that the revised sentences would not apply to crimes committed before the effective date of the revisions," i.e., October 1, 1994. Id. at 6a. The court therefore recognized that even if petitioner were sentenced in the present for his 1992 and 1994 drug offenses, he would be subject to a maximum term of imprisonment of ten years. Ibid. Accordingly, the court concluded that, assuming the statutory reference to the "maximum term [that] is prescribed by law," 18 U.S.C. 924(e)(2)(A)(ii) (emphasis added), refers to how petitioner's

offenses could have been punished by the State at the time of the federal sentencing proceeding, petitioner's prior drug offenses were punishable at the time of the federal sentencing proceeding by a maximum term of ten years' imprisonment under North Carolina law. Pet. App. 6a. The court noted that its reasoning was consistent with the Fifth Circuit's decision in United States v. Hinojosa, 349 F.3d 200 (2003), cert. denied, 541 U.S. 1070 (2004), but not the Second Circuit's decision in United States v. Darden, 539 F.3d 116 (2008). Pet. App. 6a.

DISCUSSION

Petitioner renews his contention (Pet. 6-16) that in determining whether a prior state offense is one "for which a maximum term of imprisonment of ten years or more is prescribed by law" under Section 924(e)(2)(B) of the ACCA, a court should not consider the maximum term prescribed by state law for petitioner's prior offenses. Rather, according to petitioner, the court should consider the maximum term that state law would prescribe for those offenses if they were committed on the date of petitioner's federal sentencing. In other words, petitioner claims that for ACCA purposes he should receive the benefit of intervening changes in state sentencing law that have not been made retroactive and thus do not apply to him as a matter of state law. The court of appeals correctly rejected petitioner's contention, and although there is some tension between the reasoning of the court below and the

reasoning of other courts of appeals, there is no square conflict presented by this particular case. Further review is therefore not warranted.

1. a. Petitioner is subject to the ACCA's mandatory minimum 15-year sentence if either of his two prior North Carolina convictions in 1992 and 1995 for possession with the intent to distribute cocaine qualifies as a conviction for a "serious drug offense." As relevant here, the ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * * for which the maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). The government assumes here that the statute's use of the present tense -- i.e., "the maximum term of imprisonment of ten years or more is prescribed by law," 18 U.S.C. 924(e)(2)(A)(ii) -- refers to the applicable state sentence at the time of the federal prosecution, not at the time of the underlying state prosecution.[2] In this case, as explained below, the

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[2] There is some question whether Section 924(e)(2)(A)(ii) refers to the applicable state sentence at the time the defendant commits his federal offense or at the time the defendant is sentenced on that federal offense. Compare United States v. Klump, 536 F.3d 113, 120 (2d Cir. 2008) (applying the mandatory minimum sentence in 18 U.S.C. 924(c)(1)(B)(i) that was in effect at the time of the defendant's offense), with United States v. Darden, 539 F.3d 116, 122 n.8 (2d Cir. 2008) (stating that for ACCA purposes "courts should examine the state law in place at the time of the federal sentencing, not the state law in place at the time when the federal offense was committed"). That question, however,

applicable state sentence was a maximum term of imprisonment of 10 years both at the time of petitioner's state prosecution and at the time of his federal prosecution.

The question presented in this case is how to determine the applicable state sentence at the time of the federal prosecution. The court of appeals correctly held that, for purposes of the ACCA, the relevant maximum sentence is the maximum term prescribed by state law for petitioner's prior offense. Pet. App. 6a. At the time that petitioner committed his drug offenses, North Carolina prescribed a maximum term of imprisonment of 10 years for each of those offenses. Although North Carolina subsequently lessened that maximum term to 30 months, it did not make the change retroactive to offenses like petitioner's that were committed before October 1, 1994. Accordingly, at the time of petitioner's federal prosecution, a maximum term of imprisonment of 10 years "[was] prescribed" -- and still "is prescribed" -- by North Carolina law for petitioner's drug offenses.

Petitioner is therefore incorrect (Pet. 9) that the court of appeals disregarded the ACCA's plain language or failed to apply state sentencing law as it existed at the time of petitioner's federal prosecution. To the contrary, the court of appeals looked

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is not presented by the facts of this case. Here, the applicable state sentence under North Carolina law did not change between February 28, 2007, when petitioner committed his felon-in-possession offense, and January 13, 2009, when petitioner was sentenced on that federal offense.

to the maximum state sentence "prescribed" for petitioner's drug offenses at the time of his federal sentencing -- and that maximum state sentence "is" 10 years. 18 U.S.C. 924(e)(2)(A)(ii). As the Fifth Circuit explained in United States v. Hinojosa, 349 F.3d 200 (2003), cert. denied, 541 U.S. 1070 (2004), petitioner's prior convictions are for "serious drug offense[s]" under the ACCA "because if he were sentenced by the state court for those crimes today, he would still be subject to a maximum term of at least ten years." Id. at 205.

b. Under petitioner's approach, the relevant maximum sentence for ACCA purposes is the maximum term that state law would prescribe for his prior offenses if those offenses were committed on the date of his federal sentencing. Petitioner's approach would require that the federal sentencing court consider any intervening change in state sentencing law after the commission of a state offense, without regard to whether the change was made retroactive to the offense at issue or whether the change decreased or increased the maximum state sentence for the offense. For example, suppose that a defendant is convicted of a drug-related offense that at the time of conviction is a misdemeanor under state law. Under petitioner's approach, that state misdemeanor conviction nevertheless could serve as a predicate conviction under the ACCA, if the State increased the maximum sentence for that offense to 10

years or more before the defendant committed a violation of 18 U.S.C. 922(g).'

That consequence not only demonstrates the error in considering nonretroactive intervening changes in state sentencing law, but also demonstrates the error in petitioner's invocation (Pet. 15-16) of the rule of lenity. Petitioner advocates an approach that, depending on the nature of the intervening change in state sentencing law, would neither uniformly benefit nor uniformly disadvantage criminal defendants. See United States v. O'Neil, 11 F.3d 292, 301 n.10 (1st Cir. 1993) (declining to apply the rule of lenity because "[d]epending on the facts of any particular defendant's situation, a generous reading of the [statutory] provision can produce either a harsher or a more lenient result than a cramped reading will produce").

2. Petitioner asserts (Pet. 6-7) that the court of appeals' decision conflicts with decisions of the Second and Sixth Circuits. As an initial matter, petitioner recognizes (Pet. 6) that the decision below is consistent with the Fifth Circuit's decision in Hinojosa. In Hinojosa, the defendant was convicted in Texas state

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' Contrary to the suggestion of the Second Circuit, see United States v. Darden, 539 F.3d 116, 121 n.4 (2008), it would not offend the Ex Post Facto Clause to treat a prior conviction as a predicate for an enhanced sentence on a later crime even if the prior conviction would not have qualified as a predicate at the time the prior conviction was committed; all that is required is that the prior offense qualified as a predicate at the time of the commission of the later crime. See, e.g., Gryger v. Burke, 334 U.S. 728 (1948).

court of a drug offense for which the maximum sentence under state law at the time was 99 years. 349 F.3d at 204. After the defendant's conviction, the state law was amended to provide for a maximum sentence of 2 years. The defendant therefore argued at his federal sentencing that his state drug conviction "was not a 'serious drug offense' because at the time of his federal sentencing the maximum state sentence for th[e] offense was not at least 10 years." Ibid.

The Fifth Circuit rejected that argument. It observed that the state's "revised sentencing scheme specifically provides that the revised sentences do not apply to crimes committed before the effective date of the revisions." Hinojosa, 349 F.3d at 205. The Fifth Circuit therefore held that even looking to state law as it existed at the time of federal sentencing, the defendant's convictions were for "serious drug offense[s]" under the ACCA "because if he were sentenced by the state court for those crimes today, he would still be subject to a maximum term of at least ten years." Ibid.

On that basis, the Fifth Circuit distinguished the Sixth Circuit's decision in United States v. Morton, 17 F.3d 911 (1994), which involved an intervening change in Tennessee sentencing law between the time of the defendant's state convictions and the time of his federal sentencing. In Morton, the Sixth Circuit appeared to assume that the change in state sentencing law was retroactive:

"If defendant were sentenced today, therefore, he could not receive more than six years for those convictions." Id. at 914-915. The Fifth Circuit therefore found in Hinojosa that it was conducting the same inquiry as the Sixth Circuit in Morton by looking to "the the maximum sentence for a previous conviction at the time of federal sentencing, not at the time of conviction." 349 F.3d at 205. That is the same inquiry that the court of appeals conducted here. The court of appeals in this case, and the Fifth Circuit in Hinojosa, simply concluded that the intervening changes in state sentencing law did not apply retroactively to the offenses at issue.

Petitioner also claims (Pet. 7) a conflict with the Second Circuit's decision in United States v. Darden, 539 F.3d 116 (2008), which involved an intervening change in New York sentencing law between the time of the defendant's state convictions and the time of his federal sentencing. In Darden, the Second Circuit held that, following this Court's decision in United States v. Rodriquez, 128 S. Ct. 1783 (2008), the relevant state sentence for ACCA purposes depends on whether "an enhanced maximum term is punishment for the drug[-related] offense." Darden, 539 F.3d at 126 (emphasis in original). According to the Second Circuit, "[t]he question, at bottom, is whether, in punishing the earlier timed nature of the offense more severely, the state is meting out

extra punishment for the drug[-related] offense of conviction." Ibid.

The Second Circuit in Darden concluded that the change in New York sentencing law was not intended as a judgment about the seriousness of the offense conduct: "The Reform Act, and its legislative history, amply confirm that New York does not view drug crimes committed before [the effective date of the Act] as 'more serious' than drug crimes committed after that date." 539 F.3d at 126. Even assuming that were the correct inquiry, the Second Circuit's conclusion is open to question. A State's decision not to make a sentencing amendment retroactive could be taken to indicate its judgment that, taking into account various considerations, pre-amendment crimes are to be treated more seriously than post-amendment crimes.

Regardless, there is no clear conflict between Darden and the present case, because here the court of appeals did not consider whether North Carolina's change in its sentencing scheme represented a legislative judgment that drug crimes committed after October 1, 1994, were less serious than drug crimes committed before that date. In light of the court of appeals' discussion of North Carolina's Structured Sentencing Act, that Act's specific provision "that the revised sentences would not apply to crimes committed before the effective date of the revisions," and the State's creation of "two sentencing schemes" depending on the date

of an offense, the court of appeals might well have concluded that North Carolina's change in its sentencing scheme did represent a judgment that post-amendment crimes were to be treated less seriously than pre-amendment crimes. Pet. App. 6a.

Moreover, the Second Circuit's decision in Darden predates this Court's recent decision in Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010). In Carachuri-Rosendo, the Court considered whether an alien who had been repeatedly convicted of state drug possession offenses, but who had not been charged or sentenced as a recidivist in his second or subsequent proceedings, had been "convicted" of a state offense that was a "felony punishable under" the federal drug laws. 8 U.S.C. 1229b(a)(3); 18 U.S.C. 924(c)(2). The Court held that the alien had not been convicted of an offense punishable as a federal felony, because although recidivist drug possession is punishable as a felony under federal law, the alien was not charged or sentenced as a recidivist in state court. Carachuri-Rosendo, 130 S. Ct. at 2589.

Thus, in determining whether the alien's prior conviction met the applicable statutory definition, Carachuri-Rosendo focused on the statutory penalty actually applicable to the alien, not the sentence some hypothetical defendant might have faced under other circumstances. That focus is difficult to square with the approach taken by petitioner in the present case, which focuses on the penalty faced by a hypothetical defendant who commits state

offenses at the time of the federal prosecution. Although it arose under a different statutory provision, this Court's decision in Carachuri-Rosendo potentially bears on the proper method for determining the maximum term of imprisonment for ACCA purposes in this context. This Court's review therefore would be premature, pending further consideration of the question presented in the courts of appeals in light of Carachuri-Rosendo.

Finally, the question presented in this case does not appear to have arisen with any frequency since 1986, when the ACCA first provided that drug-related offenses could be used as predicate offenses. See Anti-Drug Abuse Act of 1986, Pub. L. 99-570, tit. I, § 1402, 100 Stat. 3207-39 (Oct. 27, 1986). For that reason as well, further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2010

REPLY BRIEF

NO. 10-5258

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2010

CLIFTON TERELLE McNEILL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

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No. 10-5258

IN THE
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CLIFTON TERELLE McNEILL,
Petitioner,

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**ON PETITION FOR WRIT OF CERTIORARI
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PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

Contrary to the government's assertion that there is merely "some tension" between the lower court's decision in Petitioner's case and that of the Second Circuit's holding in *United States v. Darden*, 539 F.3d 116 (2nd Cir. 2008), Opp'n Br. 6, 12-13, the court below has in fact "entered a decision in conflict with the decision" in *Darden*. S. Ct. R. 10(c). Both of the state statutes at issue in Petitioner's case and in *Darden* prospectively reduced the maximum penalties for certain offenses, but they did not retroactively apply those reduced maximums to offense conduct which preceded the law's effective date. The issue presented here is the same as the issue decided in *Darden*, which the Second Circuit summarized as follows:

> The sole issue consolidated for disposition on appeal is whether a prior state conviction was a conviction for a 'serious drug offense' within the meaning of the ACCA, where state law prescribed a maximum sentence of at least ten years for

> the offense at the time of the state conviction but state law, prior to federal sentencing, prospectively reduced the maximum sentence to less than ten years for the same offense conduct.

Darden, 539 F.3d at 120-121. The Second Circuit answered this question in the negative, concluding that the standard to determine whether a prior state conviction qualifies as a "serious drug offense" is the maximum penalty "prescribed by current state law for the offense conduct, without regard to the date on which the defendant happened to commit the offense." *Darden*, 539 F.3d at 123. By contrast, here, the lower court held that "the date on which [Petitioner] committed his crime is critical to the determination of his sentence under North Carolina law." *United States v. McNeill*, 598 F.3d 161, 165 (4th Cir. 2010).The Fourth Circuit expressly acknowledged its holding was "contrary" to the Second Circuit's holding in *Darden*. *Id.* In support of this "contrary" holding, the court of appeals sided with the Fifth Circuit's decision in *United States v. Hinojosa*, 349 F.3d 200 (5th Cir. 2003), which the Fourth Circuit also described as "contrary" to the Second Circuit's resolution of the same issue in *Darden*. *McNeill*, 598 F.3d at 165. The Fourth Circuit's express recognition that it had adopted a "contrary" position regarding the same issue demonstrates that there is in fact a "square conflict presented by this particular case." Opp'n Br. 7.

The government also argues that review would be premature, suggesting this Court's decision in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010), "potentially bears on the proper method for determining the maximum term of imprisonment for ACCA purposes [.]" Opp'n Br. 15. *Carachuri-Rosendo*, however, addressed a different federal sentencing statute, and a distinct issue, namely, whether a person who was "not charged or sentenced as a recidivist in state court" could receive a federal sentencing enhancement merely because federal law punished

recidivist drug possession as a felony. *Id.* at 2589. In Petitioner's case, the contextual focus is upon a state's maximum penalties applicable to a particular state offense at the time of the federal offense, not upon a particular defendant or a hypothetical defendant convicted of that particular state offense. Unlike the federal sentencing enhancement at issue in *Carachuri-Rosendo*, here the "serious drug offense" inquiry focuses upon the maximum penalty which "is prescribed" for a state offense. 18 U.S.C. § 924(e)(2)(A)(ii). This inquiry does not require a federal sentencing court to determine the maximum penalty for either a particular or a hypothetical defendant. Rather, the "serious drug offense" inquiry merely looks to maximum penalty for a particular state offense under current state law at the time of the federal offense.

Moreover, while it is true that *Darden* was decided before *Carachuri-Rosendo*, the Second Circuit did have the benefit of this Court's analytically-similar decision in *United States v. Rodriquez*, 553 U.S. 377 (2008). In *Rodriquez*, this Court emphasized that state law, not federal law, determined the maximum penalties for state offenses. *Darden*, 539 F.3d at 124. Thus, the government's assertion that this Court's review of the instant petition is premature because *Carachuri-Rosendo* might provide guidance for the interpretation of the "serious drug offense" definition, is at best overstated. In the context of the issue presented in this case, *Carachuri-Rosendo* is little more than a gloss on *Rodriquez* which was carefully considered by the *Darden* court. It is therefore unlikely that anything in *Carachuri-Rosendo* would have caused the Second Circuit to reach a different outcome in *Darden*. Accordingly, postponing review of this issue to allow lower court consideration of *Carachuri-Rosendo* within the "serious drug offense" context is neither warranted or needed. In sum, *Carachuri-Rosendo* does not supply a

good reason for this Court to decline review of the issue presented, an issue which has evenly divided four appellate courts.

Finally, the government asserts this Court should not resolve this circuit split over the proper interpretation of ACCA's "serious drug offense" definition because the issue "does not appear to have arisen with any frequency since 1986," when ACCA incorporated the current definition for a "serious drug offense." Opp'n Br. 15. However, the government fails to note that this issue has arisen with increased frequency since 1994, when the Sixth Circuit first addressed it in *United States v. Morton*, 17 F.3d 911 (6th Cir. 1994). Following *Morton*, the Fifth Circuit decided *Hinojosa* in 2004, the Second Circuit decided *Darden* in 2008, and the Fourth Circuit decided Petitioner's case in 2010. Now, since the state of Delaware has also reduced the maximum penalties for certain drug felonies to below ten years, the issue presented may soon arise within the Third Circuit. *See* Pet. 7, 13-14. Since this issue is now appearing with increased frequency and has the potential to arise in additional circuits, the time is ripe for this Court to resolve the existing circuit split.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

This the 19th day of November, 2010.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAR 4 - 2011
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No. 10-5258

IN THE

Supreme Court of the United States

CLIFTON TERELLE MCNEILL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

NORMAN L. REIMER
EXECUTIVE DIRECTOR
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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") and Families Against Mandatory Minimums ("FAMM") as *amici curiae* in support of petitioner.[1]

INTEREST OF *AMICI CURIAE*

NACDL is a nonprofit organization with a national membership of more than 12,500 attorneys and 35,000 affiliates from all fifty states, including private criminal defense attorneys, public defenders, and law professors. Founded in 1958, NACDL is the only professional association that represents the criminal defense bar at the national level. Its mission is to promote the proper administration of justice, including the correct interpretation of federal criminal statutes and the sound application of federal sentencing law, and to foster the integrity, independence, and expertise of the criminal defense profession. The American Bar Association recognizes NACDL as an affiliate organization with full representation in its House of Delegates. NACDL fre-

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk

quently files *amicus curiae* briefs in criminal cases here and in other courts.

FAMM is a national nonprofit, nonpartisan organization of over 24,500 members, founded in 1991. FAMM's mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory-sentencing laws. By mobilizing prisoners and families who have been affected by unjust sentences, FAMM illuminates the human face of sentencing as it encourages state and federal sentencing reform. FAMM advocates sentencing policies that give judges discretion to distinguish among differently situated defendants and to sentence them according to their role in the crime, the seriousness of the crime, their potential for rehabilitation, and other characteristics of the offender. FAMM advances its charitable purpose in part through education of the general public and through *amicus* filings in important cases.

NACDL and FAMM are filing this brief because they believe the decision of the court of appeals is incorrect. It imposes a rule that will be burdensome to litigate and is potentially inequitable. The statutory text at issue in this case is clear. The Government strains for a reading that allows for enhanced punishment in this case, but its analysis ultimately distorts the text's plain meaning, and creates needless complexities for courts and litigants alike. The Government's reading, and the decision adopting it, should be rejected.

STATEMENT OF THE CASE

In August 2008, petitioner Clifton McNeill pleaded guilty to two counts of a federal indictment: one count of unlawful possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1), and one count of possession with intent to distribute a quantity of cocaine base, in violation of 21 U.S.C. § 841(a)(1). The indictment arose out of petitioner's February 2007 arrest following a traffic stop, during which police found a firearm and cocaine base in his possession.

The district court sentenced petitioner to 300 months' imprisonment for the felon-in-possession offense, to be served concurrently with a 240-month sentence for the drug offense. The severe punishment for merely possessing a firearm unlawfully arose in part from the district court's application of the Armed Career Criminal Act ("ACCA" or the "Act"). Under ACCA, a sentencing enhancement applies to felons in possession with at least three prior convictions for violent felonies or serious drug offenses. 18 U.S.C. § 924(e)(1).

The district court applied ACCA because of petitioner's record of North Carolina convictions between 1991 and 1995—one for robbery, one for assault, and several for drug offenses. The robbery and assault convictions qualified as violent felonies within the meaning of ACCA, but petitioner disputed that any of his drug convictions amounted to a "serious drug offense," which the Act defines as "an offense under" certain state or federal drug laws "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(i), (ii).

At the time petitioner was convicted for the state-law drug offenses, the crimes carried a maximum prison term of ten years. *See* N.C. Gen. Stat. § 14-1.1(8) (1993) (repealed). But North Carolina soon undertook a substantial reform of its sentencing system, eliminating minimum sentences for a number of offenses and reducing the maximum sentences for others. In particular, North Carolina reduced the maximum penalty for the drug offenses of which petitioner had been convicted from ten years to thirty months. *Id.* § 15A-1340.17(c), (d) (2011).

Petitioner argued that his state drug convictions did not qualify as "serious drug offenses" under ACCA because at the time he committed the federal offense for which he was being punished pursuant to ACCA, the maximum penalty for his state-law crimes was thirty months' imprisonment. The district court and court of appeals disagreed, holding that the relevant maximum for determining petitioner's ACCA eligibility was the maximum that applied at the time he committed the state-law offenses. JA129-32. Noting that North Carolina has no statute of limitations for felony offenses, the court of appeals reasoned that if petitioner "were tried and convicted today" for the drug offenses he committed in the early 1990s, he would be subject to the pre-reform sentencing statute because the sentencing revisions had not been made retroactive. JA131-32.

This Court granted certiorari on the question whether ACCA's definition of "serious drug offense" requires a federal sentencing court to look to the penalties imposed by state sentencing law at the time of the federal offense, regardless whether that

sentencing law relates back to the defendant's earlier state conviction.

SUMMARY OF ARGUMENT

ACCA imposes punishment for a federal offense—the unlawful possession of a firearm—with reference to federal or state offenses previously committed by the defendant. If a person has three or more convictions on his record for acts constituting "serious drug offenses" (or violent felonies) under ACCA when he commits a § 922(g) violation, that violation is deemed more serious and his punishment is enhanced. Because the Act is ultimately concerned with determining the seriousness of the *current* firearms offense and punishing it accordingly, the Act directs a court to assess the seriousness of a predicate drug offense as of the time of the § 922(g) violation. The use of the present tense in the statute makes the point clear: a drug offense is "serious" if "a maximum term of imprisonment of ten years or more *is* prescribed by law" for it, 18 U.S.C. § 924(e)(2)(A)(i), (ii) (emphasis added)—not "*was* prescribed by law when the offense was committed."

To explain the statute's use of the present tense, the Government contends that Congress sought to identify the maximum sentence the defendant would receive if he were convicted *now* for his actual prior offense—i.e., if the defendant were convicted today for conduct committed in 1980, what maximum sentence could be imposed on him for that conduct? The Government thus pins the maximum term allowable for the predicate crime not to "*an* offense," understood generally, but to "*the defendant*'s actual offense."

The practical effect of the Government's rule *in this case* is to calibrate petitioner's prior drug offenses to the maximum penalties in place at the time of those offenses. The practical effect of the Government's rule *in other cases*, however, is almost impossible to ascertain, which exposes the flaws in the Government's reading. The Government's approach requires an ACCA sentencing court to resolve numerous potentially difficult and even novel issues of state law. That analysis will be burdensome in practice and will create considerable uncertainty regarding what offenses may predicate a § 924(e)(1) sentence enhancement.

The Government's interpretation is unsound as a textual matter and unworkable as a practical matter. This Court should reject the Government's rule, and hold that a predicate drug offense is "serious" within the meaning of ACCA only if the generic offense is currently subject to a maximum penalty of ten years in prison.

ARGUMENT

Federal law proscribes the possession of a firearm by a person who—like petitioner here—has a felony record. 18 U.S.C. § 922(g). Under ACCA, violators of § 922(g) are subject to an enhanced sentence if they have three or more prior convictions for "a violent felony" or "a serious drug offense." *Id.* § 924(e)(1). The Act defines "serious drug offense" to mean "an offense under State law, involving ... a controlled substance"—or an offense under the Controlled Substances Act and other federal drug laws—"for which a maximum term of imprisonment of ten years or more is prescribed by law." *Id.*

§ 924(e)(2)(A). The question here is whether the sentencing court, in determining whether the "serious drug offense" enhancement applies, looks to (a) the maximum term applicable to the predicate offense at the time the defendant committed the ACCA offense for which he is being punished (as petitioner and *amici* submit), or (b) the maximum term the defendant could receive if he were, in fact, prosecuted today for the conduct he committed earlier (as the Government submits). As shown below, the former reading reflects the simplest, most straightforward reading of the statute's text and structure, whereas the latter reading not only distorts the text, but also introduces needless complexities in its application.

I. THE TEXT AND STRUCTURE OF THE ACCA REQUIRE CONSIDERATION OF THE "SERIOUSNESS" OF A DRUG OFFENSE AT THE TIME OF THE FEDERAL FIREARMS VIOLATION

The present-tense structure of § 924(e)(2)(A) is the beginning of the end of the answer to the question presented. The statute specially penalizes § 922(g) offenders if each predicate drug offense is one for which a maximum term of ten years or more "*is* prescribed by law." The statute does *not* define the qualifying predicate offense as one for which a ten-year maximum "was prescribed when the offense was committed." Accordingly, nobody seriously contends that § 924(e)(1) applies whenever the predicate drug offense *was* punishable by more than ten years when the defendant was actually sentenced for his predicate offense.

What the Government argues instead is that the

statute refers to the maximum sentence the defendant could receive if he were hypothetically prosecuted *now* for the prior conduct he committed. That is, if the defendant committed a crime in 1980, but was not prosecuted until today for that crime, what maximum sentence could be imposed on him under state law? By asking that question, the Government asserts, the sentencing court would still read the statute in the present tense—whatever maximum sentence the defendant might receive in a hypothetical prosecution today for his earlier conduct is the maximum sentence that currently "is prescribed by law" for that earlier conduct. For multiple reasons, the Government's reading cannot be sustained.

To start, an ACCA enhancement does not penalize the commission of the earlier state drug offense. Rather, it enhances the punishment for the "offense of conviction," i.e., a federal firearms violation. *See* 18 U.S.C. § 924(e)(1). "The sentence is a stiffened penalty *for the latest crime*, which is considered to be an aggravated offense because [it is] a repetitive one." *United States v. Rodriquez*, 553 U.S. 377, 386 (2008) (emphasis added; quotation omitted). As the Court explained in *Rodriquez*, ACCA effectively incorporates state-law judgments about the seriousness of the predicate drug offense into the punishment applied to the federal offense. "Congress presumably thought—not without reason—that if state lawmakers provide that a crime is punishable by 10 years' imprisonment, the lawmakers must regard the crime as 'serious,' and Congress chose to defer to the state lawmakers' judgment." *Id.* at 388. But because it is the federal offense being punished, it is the state legislative judgment about the predicate

offense *at the time of the federal offense* that matters, as the present-tense structure of the statute confirms. *See also* 18 U.S.C. § 924(e)(1) (mandatory minimum itself is set forth in the present tense, referring to one "who *violates*" § 922(g) and who "*has* three previous [qualifying] convictions," and expressly linking "serious drug offense" to that present violation (emphasis added)).

The Government's contrary argument assumes that the statute focuses on the actual crime committed by the defendant—including when it was committed—and requires reference to the current state legislative judgment about how the defendant himself could be punished if he were prosecuted today for his earlier action. That view finds no support in ACCA. To the contrary, ACCA's use of statutory maximums suggests a focus on the state legislative judgment about the seriousness of the *generic offense*, rather than on the defendant's particular crime, as to which a maximum might be wholly irrelevant in fact. *Cf. Rodriquez*, 553 U.S. at 393 (distinguishing ACCA's definition of "serious drug offense" from a provision focusing on the circumstances of the particular defendant).[2] Further, the statute uses the term "conviction" when it means

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[2] In theory, the applicable maximum reflects a legislative judgment of the appropriate punishment for a given statutory offense when violated under the most aggravating circumstances. Conversely, statutory eligibility for probation may reflect a legislative judgment about the appropriate punishment for the offense in its most mitigated form. Statutory maximums are conventionally used to compare the relative categorical seriousness of different offenses. *See Rodriquez*, 553 U.S. at 388.

"*the* defendant's offense." *See, e.g.*, 18 U.S.C. § 924(e)(1). Thus, for example, in accounting for intervening circumstances that bear on the seriousness of the defendant's *particular* felony, the Act speaks of a "conviction," not an "offense." *See id.* § 921(20) (excluding from the statute's reach "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored").

That understanding of § 924(e)(2)(A) coheres with the statute's basic structure. Congress determined that felon-in-possession violations are "aggravated" if committed with a record of "serious" offenses, and for state offenses it defers to the state's judgment of seriousness. But a scheme that fixes the seriousness of an offense to a *repudiated state judgment* with respect to that offense does nothing to establish that the *current ACCA violation* is aggravated in the relevant sense. It shows only that the predicate offense was previously thought to be serious, and it *rejects* the current state judgment about the offense—the very judgment in effect when the ACCA violation occurs. In effect, it simply punishes the defendant again for his old crimes, contrary to the teaching of *Rodriquez*. *See United States v. Darden*, 539 F.3d 116, 122 (2d Cir. 2008) ("In light of [the ACCA's] statutory purpose [to defer to the sentencing policy of each state as the measure of the seriousness of the drug offense], it was eminently reasonable for Congress to defer to the state lawmaker's current judgment rather than to the state lawmaker's discarded judgment.").

Congress knows how to condition recidivist sen-

tence enhancements on the law governing the prior offense at its commission, when that is Congress's design. *Cf. Atlantic Sounding Co. v. Townsend*, 129 S. Ct. 2561, 2564 (2009). The federal "Three Strikes" law, for example, imposes a mandatory life sentence for certain federal felonies when the offender was previously convicted of multiple serious violent felonies or serious drug offenses. 18 U.S.C. § 3559(c)(1). The statute uses markedly different language from ACCA's to demarcate a "serious drug offense," defining it as "an offense under State law that, *had the offense been* prosecuted in a court of the United States, *would have been* punishable under [certain federal drug laws]." *Id.* § 3559(c)(2)(H)(ii) (emphasis added). Congress's use of the hypothetical past perfective makes clear its intention to look back to the time of the prior offense. *See* Randolph Quirk *et al.*, *A Comprehensive Grammar of the English Language* § 14.23, at 1010 (1985) (hypothetical past perfective denotes past reference). In ACCA, by contrast, Congress asked not whether the state drug offense "would have been" punishable by a ten-year maximum sentence, but whether such a sentence "*is* prescribed" for the offense. 18 U.S.C. § 924(e)(2)(A)(i), (ii) (emphasis added).

Indeed, Congress has on several occasions considered amending ACCA to condition the seriousness of a predicate offense on the penalty in place when it was committed. *See, e.g.*, 139 Cong. Rec. H10191, H10.240-41 (daily ed. Nov. 19, 1993) (proposing to amend "serious drug offense" to include "an offense under State law which, if it *had been* prosecuted as a violation of the Controlled Substances Act *at the time of the offense* ... would have been punishable by a

maximum term of imprisonment of ten years or more" (emphasis added)); 138 Cong. Rec. S6.671 (daily ed. May 14, 1992) (similar, supposing prosecution "as a violation of the Controlled Substances Act ... *as that Act provided at the time of the offense*" (emphasis added)). There is no question Congress could have formulated a retrospective seriousness rule if it had intended to do so.

ACCA in its current form is the product of considerable debate about the statute's federalism implications. *See generally* James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 Harv. J. Legis. 537, 546 (2009); Derrick D. Crago, Note, *The Problem of Counting to Three Under the Armed Career Criminal Act*, 41 Case W. Res. L. Rev. 1179, 1192 (1991). Against that background, the best reading of the statute is the one that accounts for the full reach of the state policy which Congress has incorporated. A state pronounces the seriousness of an offender's *particular crime* when it prosecutes and sentences him for it. But the state may alter its judgment about the seriousness of the *statutory offense* he committed, as it revisits the applicable sentencing maximums and minimums (if any). Section 924(e) punishes a federal violation of firearms law with reference to the state's current sentencing law for an offense. This Court's interpretation should respect the statutory language and fulfill Congress's design by giving that state law effect.

II. THE GOVERNMENT'S RULE WOULD CREATE UNNECESSARY COMPLEXITY AND UNCERTAINTY

Petitioner's interpretation of § 924(e)(2)(A) is simple and clear. To determine whether an offender has a conviction for a "serious drug offense" within the meaning of ACCA, a federal court need only identify the maximum penalty for the predicate offense under current state law. The inquiry requires no difficult judgments regarding unsettled issues of state law or the record of earlier proceedings. Its simplicity will promote uniformity in federal courts' treatment of a given prior offense.

The Government's approach, by contrast, asks courts to indulge in a difficult hypothetical exercise. On this reading, which attempts to account for ACCA's use of the present tense to describe the sentence applicable to the federal defendant's state offenses, a court must imagine that an offender has not yet been sentenced for his prior offenses (which may have occurred decades in the past) and attempt to determine what penalty a state court could impose on him if he were prosecuted and convicted for those offenses today. As the decision below recognizes, that thought experiment requires a sentencing court to determine the retroactive effect of any intervening changes in state sentencing law, which itself introduces complication and uncertainty, especially given the ambiguity of many retroactivity rules in application. But there are also other complicating factors overlooked by the decision below, including statutes of limitation and the doctrine of abatement on a delayed prosecution—rules that in many cases would

substantially confuse or even preclude the sentencing analysis imagined by the Government.[3]

1. This Court frequently considers the judicial administrability of competing interpretations in order to determine the better interpretation of a statute. *See, e.g., Skilling v. United States*, 130 S. Ct. 2896, 2932 (2010) (construing 18 U.S.C. § 1346 narrowly to avoid interpretation encompassing "amorphous category of cases" that produced "inter-circuit inconsistencies"); *Bartlett v. Strickland*, 129 S. Ct. 1231, 1244-45 (2009) (plurality op.) (finding "support for the majority-minority requirement [of 42 U.S.C. § 1973] in the need for workable standards and sound judicial and legislative administration"); *Gonzalez v. United States*, 553 U.S. 242, 249-50 (2008) (construing 28 U.S.C. § 636(b)(3) and concluding that "[t]o hold every instance of waiver requires the personal consent of the client ... would be impractical"). When a proposed interpretation is dysfunctional—because it is confusing in operation, or taxes judicial resources, or produces unpredictable results—and a clear alternative exists, this Court is rightly skeptical that Congress intended the impractical meaning. *See Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 588-89 (2008) ("It strains credulity that Congress would have abandoned [a] predictable, workable framework for the uncertain and complex ... re-

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[3] The Government's interpretation also poses constitutional issues, insofar as it potentially requires court findings concerning details about the state conviction (apart from the fact that it occurred) that have not been pleaded and proved by the government. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Darden*, 539 F.3d at 123 n.11.

quirements that [the alternative] rule would inflict").

2. The construction of § 924(e)(2)(A) advanced by petitioner produces the simplest possible rule for identifying predicate drug offenses: determine the offense's current maximum penalty. *See Darden*, 539 F.3d at 128 (holding that courts should "defer to state lawmakers' current judgment about the seriousness of the offense as expressed in their current sentencing laws"). The procedure requires that litigants and courts do nothing more than consult the state sentencing statute in place at the time of the § 922(g) violation, and it ensures national uniformity in the administration of ACCA (at least insofar as such uniformity is possible in a statute that incorporates state law). The maximum allowable sentence is likely to be easily ascertained, and federal defendants, prosecutors, and sentencing courts can advert to a settled body of law to determine the governing penalty with little fuss. The ease of this analysis means that courts can be expected to reach uniform decisions about the applicability of § 924(e)(2)(A) to particular drug offenses in any given state.[4]

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[4] The only potential complexity risked by this interpretation would arise if the state had reformulated the offense itself in some respect after the defendant's predicate conviction. That circumstance is not present here, but it would not be a serious complication where it did arise. The court could simply identify the current offense (if any) violated by the conduct necessarily established in the earlier conviction. If there is no relevant offense identifiable, then there is no predicate offense under ACCA. At worst the analysis would be one step more complicated in a very rare set of circumstances, whereas it would not even be *possible* in many instances to conduct the analysis proposed by the Government, as explained *infra*.

3. By contrast, the rule urged by the Government is subject to multiple complexities and ambiguities, casting serious doubt on any notion that Congress intended the rule for a nationwide federal sentencing scheme. In this case, to be sure, the rule is applied with relative ease. The Fourth Circuit determined that petitioner's prior offenses were serious by examining the sentence he would receive "if [he] were tried and convicted today for his drug offenses." JA132. Because North Carolina's revised sentencing scheme was not made retroactive, and there is no limitations period for petitioner's state-law offenses, the court could easily identify the maximum sentence petitioner would have received if he were prosecuted and sentenced today for those decades-old crimes. *Id.*

Although that conclusion was relatively straightforward here, it is not difficult to foresee the difficult questions that the same analysis would require of courts in different cases.

a. One variable, identified by the court of appeals, is the retroactivity of a change in penalty. Retroactive changes to sentencing regimes are less common than prospective ones, but they do occur. *See, e.g.*, Cal. Penal Code § 1170.2. The issue they present is simple. Under the Government's approach, if a sentence revision reducing the maximum to less than ten years is made retroactive, then the ACCA sentencing court must apply the sentence revision to the defendant's offense and find that the offense is not "serious" under state law. If the sentence revision is not retroactive, then the ACCA court applies the maximum in place at the time of

the predicate offense.

The issue is thus easily stated, but it is not easily resolved, because retroactivity rules are often unclear in application. Even a statutory provision disclaiming retroactivity does not necessarily settle the issue. *See, e.g., State v. Cummings*, 386 N.W.2d 468, 472 (N.D. 1986) (holding that new, lesser criminal penalty should be applied retroactively, irrespective of general statutory provision conditioning retroactivity on express declaration, because "the excess in punishment can serve no other purpose than to satisfy a desire for vengeance, a legislative motivation we will not presume"). Litigating the question of retroactivity accordingly can be resource intensive, as courts must closely parse statutory language to determine whether the legislature intended a given change to be retroactive. *See, e.g., State v. Reis*, 165 P.3d 980, 991-92 (Haw. 2007); *id.* at 1018-19 (dissent) (arguing that saving clause was general and did not evince a legislative intent to deny retroactive amelioration in the applicable penalty). And reasonable minds may often take differing views as to the retroactivity of a statute. *See, e.g., Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 36 n.5 (2006) (detailing circuit split on retroactivity of the Illegal Immigration Reform and Immigrant Responsibility Act). The Government's focus on the retroactivity of sentencing changes opens the door to divergent judgments about the intended retroactive effect of a given state sentencing change (a question which could arise in any number of federal courts across the country), with the consequence that defendants may be subject to variable treatment depending only on where they are sentenced for violating § 922(g).

b. There are other problems with requiring courts to pretend that the original crime is just now being brought to trial. Statutes of limitation, in particular, present a complication the decision below did not address.

When a statute of limitations applies to the offender's prior offense and the limitations period has expired, it is a nonstarter to ask what sentence the offender would be subject to were he sentenced for his crime today—he could not even be *charged* for the offense today. It is, of course, possible that the Government contemplates that we imagine the offender was prosecuted then and *sentenced* today, but that simply exchanges the limitations question for a host of constitutional issues. The point is not to suggest that one problem is preferable to another, but to show the bankruptcy of the entire framework.

The problems are not hypothetical. Suppose that an individual "H" has a 2000 Texas conviction for a drug offense carrying a maximum sentence of ten years or more (*e.g.*, possession of mescaline with intent to deliver, *see* Tex. Health & Safety Code §§ 481.103, 481.113(d) (2000); Tex. Penal Code § 12.32 (2000)). If H has been convicted of two other ACCA predicate offenses and violates § 922(g) in 2010, it is unclear whether H's 2000 conviction would come within § 924(e)(1) and qualify him for its mandatory minimum, because Texas law applies a three-year statute of limitations to the 2000 drug offense. Tex. Code Crim. Proc. § 12.01(7). It would be nonsensical to ask what sentence he could get today for his 2000 drug offense—the only answer is *none at all*. Even if we suppose that H was charged within

the limitations period, the intervening years would still implicate H's speedy trial rights and thus cast doubt on whether he could actually be sentenced today for the ten-year-old offense. *See Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) (courts "have generally found postaccusation delay 'presumptively prejudicial'" when it approaches one year).

The facts in *United States v. Hinojosa*, 349 F.3d 200 (5th Cir. 2003), squarely presented these issues. There, the defendant committed a drug offense in 1993 whose then-applicable 99-year statutory maximum was later reduced to two years. *Id.* at 204. Years later, in 2002, the defendant was convicted of an ACCA violation, and the court of appeals upheld the application of § 924(e)(1)'s mandatory minimum. In order to maintain the fiction that it was evaluating the seriousness of the defendant's predicate drug offense in view of the sentence he could receive in 2002, the court of appeals necessarily ignored the three-year limitations period that would have barred his hypothetical prosecution. The court more likely simply applied the sentence that governed when the predicate offense was committed, in direct contravention of ACCA's present-tense construction.

ACCA itself imposes no expiration date on its predicate offenses, and many ACCA cases involve individuals who committed predicate drug offenses many years earlier. *See, e.g.*, *Darden*, 539 F.3d at 118 (§ 922(g) violation in 2000; defendant's predicate drug offense committed in 1989); *Hinojosa*, 349 F.3d at 204 (2002 § 922(g) violation, 1993 predicate drug offense). Because numerous states have statutes of

limitations for felonies, the limitations problem will confront many courts under the Government's reading of ACCA. *See, e.g.*, N.Y. Code Crim. Proc. § 30.10; Cal. Penal Code §§ 800-801; 720 Ill. Comp. Stat. 5/3-5; 42 Pa. Cons. Stat. § 5552.

c. Abatement and saving clauses pose yet another challenge. Abatement is a well-established common-law doctrine providing that all pending prosecutions must terminate following a legislative repeal or amendment of the authorizing statute, in the absence of a contrary saving provision. *See, e.g.*, *Bell v. Maryland*, 378 U.S. 226, 230 (1964); S. David Mitchell, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, 37 Am. J. Crim. L. 1, 6 (2009). Several states do not have a general saving statute, and so pending prosecutions may be abated by changes in penalties such as those in this case. *See id.* at 47 (listing states without general saving statutes). Even saving provisions, enacted by legislatures to avoid abatement, also sometimes provide for the retroactive application of reduced penalties. *See, e.g.*, 5 Ill. Comp. Stat. 70/4 (allowing affected party to choose whether new or old penalty shall apply); Tex. Gov't Code § 311.031(b); Vt. Stat. tit. 1, § 214(c).

The principles of abatement and retroactive amelioration of pending prosecutions complicate the analysis proposed by the Government, which looks to the sentence available if the defendant "were tried and convicted today." JA132. If a court must determine the maximum sentence for an individual's prior offense by imagining that the offender is being sentenced for the prior offense today, then it is effec-

tively also imagining that a final judgment has not yet been rendered. The hypothetical state sentencing court could thus be expected either to abate the prosecution or to apply a new penalty, if the legislature has reduced it. In a state like Vermont, then, where the general saving statute provides that a statute revising the penalty for any offense downward must be given effect unless final judgment has already been entered, *see* Vt. Stat. tit. 1, § 214(c), the hypothetical present-day maximum sentence would have to be reduced accordingly.

Any federal court not familiar with the niceties of Vermont legislative procedure is thus in for a difficult determination.[5] Yet in today's highly mobile economy, someone with a prior Vermont conviction could easily be subject to ACCA sentencing years later in any federal district court in the country. And state law may be particularly prone to uncertainty on the question whether a saving clause applies to any given enactment, because the number of cases directly impacted by such a change in criminal law will likely be small. Only those cases still open at the time the new law becomes effective would be directly affected. *See* Mitchell, *supra*, at 9. The Fourth Circuit's approach multiplies the importance of that question, applying it to a vastly greater number of offenders, because it asks federal courts effec-

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[5] Similar saving statutes also exist in Illinois, Iowa, Kentucky, New Hampshire, Ohio, Texas, Virginia, and West Virginia. 5 Ill. Comp. Stat. 70/4; Iowa Code § 4.13(2); Ky. Rev. Stat. Ann. § 446 110, N.H. Rev. Stat. Ann. § 624:5; Ohio Rev. Code Ann § 1 58(B); Tex. Gov't Code § 311.031(b); Va. Code Ann. § 1-239; W. Va. Code § 2-2-8.

tively to reopen a large number of closed predicate convictions. But it will be federal, not state, courts struggling to interpret these esoteric state rules.

d. The Government's approach also would require federal courts to engage in difficult inquiries surrounding the application of state recidivism enhancements. States will on occasion revise their statutes directing additional penalties for repeat offenders whose prior offense meets certain conditions, to material effect. *See, e.g., Harlow v. State*, 820 P.2d 307, 309 (Alaska Ct. App. 1991) (discussing revisions to Alaska Stat. § 12.55.145 (1981)). On the Government's reading, federal courts would now also have to determine the retroactive effect of *those* changes in order to hypothesize an ACCA defendant's maximum state sentence. That would require accounting for not just the intended effect of changes, but also the *ex post facto* implications of any effective increase in penalty. *See Collins v. Youngblood*, 497 U.S. 37, 40-46 (1990). Of all the novel state issues forced on federal courts by the Government's interpretation, this is perhaps the least likely to have a developed body of state precedent to guide the federal determination. While *Rodriquez* obviously requires some steps into the quagmire surrounding state recidivism enhancements, *see* 553 U.S. at 388-89, this interpretation thrusts federal courts waist-deep into the bog.

* * * *

The Government's proposed interpretation of § 924(e)(2)(A) requires courts to interpret uncertain areas of state law. Courts would have to engage in detailed readings of state statutes in order to under-

stand the maximum penalty available for the earlier offense and determine whether subsequent alterations had a retroactive effect. The suggested hypothetical exercise would not even be *possible* in some cases, where the operation of a statute of limitations would bar a defendant's being "tried and convicted today." JA132. In addition to needlessly complicating ACCA prosecutions and wasting judicial resources, the legal uncertainty engendered by the Government's rule would result in disparate treatment for ACCA violators with prior convictions for the same offenses in the same state. For all those costs, little would be gained, save the opportunity to sentence a federal defendant according to a repudiated assessment of his state offense's severity. It is highly doubtful that Congress intended such a scheme. *See Busic v. United States*, 446 U.S. 398, 409 (1980) (rejecting "assumption" that "Congress' sole objective was to increase the penalties for firearm use to the maximum extent possible"). Petitioner's interpretation, which gives the statutory text its most natural meaning without creating "practical difficulties and potential unfairness," *Taylor v. United States*, 495 U.S. 575, 601 (1990), should be adopted by this Court. A state drug offense is "serious" within the meaning of the ACCA if the generic offense is punishable by ten years' imprisonment at the time of the ACCA violation.

CONCLUSION

For the foregoing reasons and those stated in petitioner's briefs, the Court should vacate the judgment of the court of appeals and remand for resentencing.

Respectfully submitted,

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Dated: March 4, 2011

JOINT APPENDIX

No. 10-5258

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
FEB 25 2011
OFFICE OF THE CLERK

CLIFTON TERELLE MCNEILL
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Date Filed: 01/02/2008
Court of Appeals Docket #: 09-4083
Case Number: 5:08-cr-00002-D-1

US

v.

CLIFTON MCNEILL

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET TEXT
01/22/2009	1	Criminal case docketed. Originating case number: 5:08-cr-00002-D-1. Date notice of appeal filed:. Case manager: Brian Bain. [09-4083] (BB)
01/22/2009	2	JURISDICTIONAL NOTICE issued re: judgment not yet entered Originating case number: 5:08-cr-00002-D-1, [09-4083] (BB)
01/27/2009	3	DISTRICT COURT UPDATE. JUDGMENT as to Clifton Terelle McNeill (1). Count 1: Bureau of Prisons – 300 months; Supervised release of 5 years with special conditions imposed; Count 2: Bureau of Prisons – 240 months, concurrent with Count 1. The total sentence of 300 months shall run consecutively to the state term defen-

DATE	#	DOCKET TEXT
		dant is presently serving. Supervised Release – 3 years, concurrent with Count 1, with special conditions. Count 3: Dismissed on motion of the government. Special assessment of $200 imposed, with no fine or restitution. Defendant remanded to custody of U.S. Marshal. Signed by Judge James C. Dever III on 1/13/09. [09-4083] (AC)
01/27/2009	4	DOCKETING NOTICE issued. Re: [3], district court update, [1], case docketed Initial forms due within 14 days. Originating case number: 5:08-cr-00002-D-1. [09-4083] (BB)
01/28/2009	5	NOTICE re: district court's 1/26/09 entry of judgment filed by US. [09-4083] Anne Hayes
01/30/2009	6	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by Anne M. Hayes for US. [998024279] [09-4083] Anne Hayes
02/09/2009	7	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by G. Alan DuBois for Clifton Terelle McNeill. [998030021] [09-4083] G. DuBois
02/09/2009	8	DOCKETING STATEMENT filed by Appellant Clifton Terelle McNeill. [09-4083] G. DuBois
02/09/2009	9	TRANSCRIPT ORDER FORM filed for Donna Tomawski. [09-4083] G. DuBois

DATE	#	DOCKET TEXT
02/09/2009	10	DOCKETING STATEMENT filed by Appellant Clifton Terelle McNeill. [09-4083] G. DuBois
02/09/2009	11	TRANSCRIPT ORDER ACKNOWLEDGMENT filed for Donna Tomawski. Description of transcript being ordered: Sentencing 1/13/09 and Pre-Trial (Full Rule 11) 8/18/08 for Clifton T. McNeill.. Originating case number: 5:08-cr-00002-D-1. [09-4083] (BB)
03/11/2009	12	TRANSCRIPT EXTENSION REQUEST filed by Donna Tomawski. Extension requested until 4/14/2009 [09-4083] (JB)
03/11/2009	13	ORDER filed [998051614] granting Motion to extend time to file transcript [12] Copies to all parties. [09-4083] (JB)
04/14/2009	14	DISTRICT COURT UPDATE. OFFICIAL TRANSCRIPT of Sentencing Hearing as to Clifton Terelle McNeill for dates of January 13, 2009 before Judge Dever, re [36] Notice of Appeal – Final Judgment Court Reporter/ Transcriber Donna J. Tomawski. [09-4083] (AD)
04/14/2009	15	DISTRICT COURT UPDATE. OFFICIAL TRANSCRIPT of Rule 11 as to Clifton Terelle McNeill for dates of August 18, 2008 before Judge Dever, re [36] Notice of Appeal – Final

DATE	#	DOCKET TEXT
		Judgment Court Reporter/Transcriber Donna J. Tomawski. [09-4083] (AD)
04/14/2009	16	BRIEFING ORDER filed. Opening brief and appendix due 05/19/2009. Response brief due 06/12/2009 [09-4083] (BB)
05/19/2009		BRIEF filed by Appellant Clifton Terelle McNeill in electronic and paper format. Type of Brief: Opening.
	17	Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 05/19/2009. [998102655] [09-4083] G. DuBois
05/19/2009	18	CERTIFICATE OF CONFIDENTIALITY filed (Local Rule 25(c)) by Clifton Terelle McNeill. Sealing Required: Yes. Description of document referenced by certificate: Joint Appendix, Vol II: Presentence Report & Statement of Reasons. [09-4083] G. DuBois
05/19/2009	19	Notice of paper filing filed by Appellant Clifton Terelle McNeill of Joint Appendix, Vol II (sealed); Presentence Report & Statement of Reasons. Date paper copies mailed, dispatched or delivered to court:. Method of filing paper copies: mail. [09-4083] G. DuBois
05/19/2009	20	OPENING BRIEF (PAPER) filestamped, on behalf of Clifton Terelle McNeill. Number of pages: [44]. Sufficient: YES. Entered on Docket

DATE	#	DOCKET TEXT
		Date: 05/23/2009. [998105702] [09-4083] (BB)
05/19/2009	21	APPENDIX (PAPER) file-stamped, on behalf of Clifton Terelle McNeill. Total number of volumes (including any sealed): 2. Total number of pages in all volumes: 145. Total number of sealed volumes: 1. Entered on Docket Date: 05/23/2009. [998105703] [09-4083] (BB)
05/23/2009	22	ORDER filed [998105705] sealing. Volume II of the Joint Appendix. Copies to all parties. [09-4083] (BB)
06/12/2009	23	BRIEF filed by Appellee US in electronic and paper format. Type of Brief: Response. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 06/15/2009.. Is this a redacted brief? No. If yes, have you verified that the redacted material cannot be revealed by cutting and pasting text? N/A. [998119240] [09-4083] Anne Hayes
06/12/2009	24	RESPONSE BRIEF (PAPER) file-stamped, on behalf of US. Number of pages: [38]. Sufficient: YES. Entered on Docket Date: 06/24/2009. [998126552] [09-4083] (BB)
06/24/2009	25	MOTION filed by Appellant Clifton Terelle McNeill to extend filing time for reply brief until July 2, 2009. Date

DATE	#	DOCKET TEXT
		of service: 06/24/2009 [998126753] [09-4083] G. DuBois
06/24/2009	26	ORDER filed [998126866] granting Motion to extend filing time [25], updating/resuming reply brief deadlines Reply brief due 07/02/2009 Copies to all parties. [09-4083] (BB)
07/02/2009	27	BRIEF filed by Appellant Clifton Terelle McNeill in electronic and paper format. Type of Brief: Reply. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 07/02/2009.. Is this a redacted brief? No. If yes, have you verified that the redacted material cannot be revealed by cutting and pasting text? N/A. [998133060] [09-4083] G. DuBois
07/02/2009	28	Notice of paper filing filed by Appellant Clifton Terelle McNeill of. Date paper copies mailed, dispatched or delivered to court: 07/02/2009. Method of filing paper copies: mail. [09-4083] G. DuBois
07/02/2009	29	REPLY BRIEF (PAPER) file-stamped, on behalf of Clifton Terelle McNeill. Number of pages: [21]. Sufficient: YES. Entered on Docket Date: 07/21/2009. [998144674] [09-4083] (BB)
11/02/2009	30	CASE TENTATIVELY CALENDARED for oral argument during the 1/26/10 - 1/29/10 argument session.

DATE	#	DOCKET TEXT
		Notify Clerk's Office of any scheduling conflict by: 11/06/2009 [09-4083] (JLC)
11/06/2009	31	NOTICE FILED RE: CONFLICT WITH PROPOSED ARGUMENT DATES filed by Appellee US. Argument Session: 01/2010. Days you are available: request for consecutive argument days with 008-5007.. [09-4083] Anne Hayes
11/19/2009	32	CASE CALENDARED for oral argument. Date: 01/29/2010. Time: 7:45 - 8:00 [09-4083] (JLC)
11/20/2009	33	ORAL ARGUMENT ACKNOWLEDGMENT filed by Appellant Clifton Terelle McNeill. Counsel arguing: James E, Todd, Jr.. Counsel present but not arguing in criminal case: G. Alan DuBois. [998228015] [09-4083] G. DuBois
12/01/2009	34	ORAL ARGUMENT ACKNOWLEDGMENT filed by Appellee US. Counsel arguing: Anne M. Hayes.. [998233010] [09-4083] Anne Hayes
01/12/2010	35	Letter re: Notification of error on Page 16 of Appellee's brief [32],calendar case filed by Appellee US. [998257194] [09-4083] Anne Hayes
01/20/2010	36	APPEARANCE OF COUNSEL filed (Local Rule 46(c)) by JAMES E. TODD, JR. for Clifton Terelle McNeill. [998262330] [09-4083] G. DuBois

DATE	#	DOCKET TEXT
01/20/2010		ORAL ARGUMENT ACKNOWLEDGMENT filed by Appellant Clifton Terelle McNeill. Counsel arguing:
	37	James E. Todd, Jr.. Counsel present but not arguing in criminal case: G. Alan DuBois. [998262954] [09-4083] James Todd
01/29/2010	38	ORAL ARGUMENT heard before the Honorable WILLIAM B. TRAXLER, JR., PAUL V. NIEMEYER and JACKSON L. KISER. Attorneys arguing case: Mr. James Edward Todd, Jr. for Appellant Clifton Terelle McNeill and Ms. Anne Margaret Hayes for Appellee US. Courtroom Deputy: Judith Evans. [998269655] [09-4083] (JLE)
01/29/2010	39	NOTICE re: oral argument error filed by US. [09-4083] Anne Hayes
03/08/2010	40	PUBLISHED AUTHORED OPINION filed. Originating case number: 5:08-cr-00002-D-1 Copies to all parties and the district court/agency. [998292714] [09-4083] (TAF)
03/08/2010	41	JUDGMENT ORDER filed. Decision: affirmed. Originating case number: 5:08-cr-00002-D-1. Entered on Docket Date: 03/08/2010. [998292716] Copies to all parties and the district court/agency. [09-4083] (TAF)
03/22/2010	42	PETITION for rehearing and rehearing en banc filed by Appellant Clifton Terelle McNeill. [09-4083] G. DuBois

DATE	#	DOCKET TEXT
03/22/2010	43	Mandate stayed by FRAP 41(d)(1). [09-4083] (CB)
04/05/2010	44	COURT ORDER filed [998312151] denying Motion for rehearing and rehearing en banc [42] Copies to all parties. [09-4083] (DSD)
04/13/2010	45	Mandate issued. Referencing: [41], Judgment Order, [40], Opinion. Originating case number: 5:08-cr-00002-D-1 [09-4083] (BB)
07/12/2010	46	SUPREME COURT REMARK—petition for writ of certiorari filed. 07/02/2010. 10-5258. [09-4083] (DHB)
02/02/2011	47	SUPREME COURT REMARK—petition for writ of certiorari granted. 01/07/2011 [09-4083] (DHB)

U.S. DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
(Western Division)

CRIMINAL DOCKET FOR
CASE #: 5:08-cr-00002-D-1

Date Filed: 01/02/2008
Date Terminated: 01/13/2009

USA

v.

McNeill

Assigned to: Judge James C. Dever, III
Appeals court case number: '09-4083' '4CCA'

Defendant (1)

Clifton Terelle McNeill
TERMINATED:
01/13/2009

represented by

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ATTORNEY TO BE
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Designation: Public Defender
or Community Defender
Appointment

Pending Counts	Disposition
Felon in possession (1)	Bureau of Prisons – 300 months; Supervised release of 5 years with special conditions imposed.
Possession with intent to distribute (2)	Bureau of Prisons – 240 months, concurrent with Count 1. The total sentence of 300 months shall run consecutively to the state term defendant is now serving. Supervised Release – 3 years, concurrent with Count 1, with special conditions. Special assessment of $200 imposed, with no fine or restitution. Defendant remanded to custody of U.S. Marshal.

Highest Offense Level (Opening)

Felony

Terminated Counts	Disposition
Possesion of firearm during and in relation to a drug trafficking crime. (3)	Dismissed on motion of the government.

Highest Offense Level (Terminated)

Felony

Complaints	Disposition
None	

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USA

represented by

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ATTORNEY TO BE NOTICED

DATE	#	DOCKET TEXT
01/02/2008	1	INDICTMENT as to Clifton Terelle McNeill (1) count(s) 1, 2, 3. (Deputy Clerk - AEB,) (Entered: 01/03/2008)
01/02/2008	3	Warrant Requested by USA as to Clifton Terelle McNeill (Deputy Clerk - AEB,) (Entered:01/03/2008)
04/24/2008	4	NOTICE OF HEARING as to Clifton Terelle McNeill Initial Appearance on Writ set (per request of AUSA Watford-McKinney) for 5/12/2008 10:00 AM in Raleigh - 6th Floor Courtroom before USMJ William A. Webb. (Deputy Clerk - STP,) (Entered: 04/24/2008)
04/29/2008		MOTION for Writ of Habeas Corpus ad prosequendum by AUSA Y. Watford-McKinney as to Clifton Terelle McNeill. (Deputy Clerk - BG) (Entered: 04/29/2008)
04/29/2008	5	ORDER granting Motion for Writ of Habeas Corpus ad prosequendum as to Clifton Terelle McNeill. Signed by USMJ William A. Webb on 4/29/2008. Initial Appearance is set for 5/12/08 at 10am in Raleigh. (Deputy Clerk - BG) (Entered: 04/29/2008)
05/09/2008	6	MOTION for Detention by USA as to Clifton Terelle McNeill. (Watford-McKinney, Yvonne) (Entered: 05/09/2008)
05/12/2008		Minute Entry for proceedings held before USMJ William A. Webb: Initial Appearance as to Clifton Terelle

DATE	#	DOCKET TEXT
		McNeill held on 5/12/2008, in Raleigh. Govt. represented by Mike James, Diana Pereira for FPD, Bonnie Craig for USPO. Ct. appoints FPD. Deft. advised of charges, rights, max. punishments. Govt. moves for dtn. Deft. is currently serving state sentence. Deft. voluntarily waives detention hearing. Deft. ordered detained and remanded to custody of USM. (Court Reporter FTR.) (Deputy Clerk - STP,) (Entered: 05/12/2008)
05/12/2008	7	CJA 23 Financial Affidavit by Clifton Terelle McNeill (Deputy Clerk - STP,) (Entered: 05/12/2008)
05/12/2008	8	ORDER APPOINTING FEDERAL PUBLIC DEFENDER as to Clifton Terelle McNeill. Signed by USMJ William A. Webb on 5/12/08. (Deputy Clerk - STP,) (Entered: 05/12/2008)
05/12/2008		Oral MOTION for Detention by USA as to Clifton Terelle McNeill. (Deputy Clerk - STP,) (Entered: 05/12/2008)
05/12/2008	9	WAIVER of Detention Hearing by Clifton Terelle McNeill (Deputy Clerk - STP,) (Entered: 05/12/2008)
05/12/2008		Arrest of Clifton Terelle McNeill (Deputy Clerk - STP,) (Entered: 05/12/2008)
05/14/2008	10	NOTICE OF ATTORNEY APPEARANCE: Devon Donahue appearing for Clifton Terelle McNeill (Donahue, Devon) (Entered: 05/14/2008)

DATE	#	DOCKET TEXT
05/14/2008	11	Request for discovery as to Clifton Terelle McNeill. (Donahue, Devon) (Entered: 05/14/2008)
05/15/2008	12	SCHEDULING ORDER as to Clifton Terelle McNeill Arraignment set for 7/7/2008 09:00 AM in Raleigh - 7th Floor - Courtroom 1 before Judge James C. Dever III. Discovery due by 6/2/2008. Motions due by 6/11/2008. Response to Motion due by 6/25/2008. Signed by Magistrate Judge David W.Daniel on 5/15/08. (Deputy Clerk - JM,) (Entered: 05/16/2008)
06/05/2008	13	Arrest Warrant Returned Executed on 5/12/2008 as to Clifton Terelle McNeill. (Deputy Clerk - JA,) (Entered: 06/06/2008)
06/25/2008	14	MOTION for Writ of Habeas Corpus ad prosequendum by USA as to Clifton Terelle McNeill for July 7, 2008 at 10:00 a.m. in Raleigh, NC. (Deputy Clerk - TC) (Entered: 06/25/2008)
06/25/2008	15	ORDER granting 14 Motion for Writ of Habeas Corpus ad prosequendum as to Clifton Terelle McNeill (1). Signed by USMJ James E. Gates on 6/25/08. (Deputy Clerk - TC) (Entered: 06/25/2008)
07/01/2008	16	NOTICE OF HEARING as to Clifton Terelle McNeill Arraignment set for 7/7/2008 09:00 AM in Raleigh - 7th Floor - Courtroom 1 before Judge

DATE	#	DOCKET TEXT
		James C. Dever III. (Deputy Clerk - JHC) (Entered: 07/01/2008)
07/01/2008	17	MOTION to Continue *Arraignment and Trial* by USA as to Clifton Terelle McNeill. (Attachments: # 1 Text of Proposed Order) (Watford-McKinney, Yvonne) (Entered: 07/01/2008)
07/01/2008	18	RESPONSE in Support by Clifton Terelle McNeill re 17 MOTION to Continue *Arraignment and Trial* (Donahue, Devon) (Entered: 07/01/2008)
07/02/2008		Motion Submission as to Clifton Terelle McNeill re 17 MOTION to Continue *Arraignment and Trial* to Judge Dever's chambers. (Deputy Clerk - AEB,) (Entered: 07/02/2008)
07/02/2008	19	ORDER granting 17 Motion to Continue as to Clifton Terelle McNeill (1) continuing the arraignment and trial from the July 7 session until the August 18, 2008 session. Signed by Judge James C. Dever III on 7/2/08. (Deputy Clerk - AEB,) (Entered: 07/02/2008)
07/02/2008		Reset Hearings as to Clifton Terelle McNeill: per chambers Sentencing set for 8/18/2008 09:00 AM in Raleigh - 7th Floor - Courtroom 1 before Judge James C. Dever III. (Deputy Clerk - AEB,) (Entered: 07/02/2008)

DATE	#	DOCKET TEXT
08/05/2008		Set/Reset Hearings as to Clifton Terelle McNeill: Arraignment set for 8/18/2008 09:00 AM in Raleigh - 7th Floor - Courtroom 1 before Judge James C. Dever III. (Deputy Clerk - JM,) (Entered: 08/05/2008)
08/06/2008	21	NOTICE OF HEARING as to Clifton Terelle McNeill: Arraignment set for 9/18/2008 09:00 AM in Raleigh - 7th Floor - Courtroom 1 before Judge James C. Dever III. (Deputy Clerk - LC) (Entered: 08/06/2008)
08/06/2008		NOTICE OF CORRECTION re: 21 Notice of Hearing: Arraignment is set for the AUGUST 18, 2008 term of court. (Deputy Clerk - LC) (Entered: 08/06/2008)
08/07/2008	22	ORAL MOTION to Dismiss Count 3 of the Indictment at sentencing by USA as to Clifton Terelle McNeill. (Deputy Clerk - JHC) (Entered: 08/07/2008)
08/07/2008		NOTICE OF CORRECTION by Clifton Terelle McNeill re: 22 Motion to Dismiss (Disregard DE#22 - Docketed in error) (Deputy Clerk - JHC) (Entered: 08/07/2008)
08/07/2008	23	MOTION for Writ of Habeas Corpus ad prosequendum by USA as to Clifton Terelle McNeill. (Deputy Clerk - JJ,) (Entered: 08/07/2008)

DATE	#	DOCKET TEXT
08/07/2008	24	ORDER granting 23 Motion for Writ of Habeas Corpus ad prosequendum as to Clifton Terelle McNeill (1) Appearance is necessary on 8/18/2008 at 9:00 a.m. in U.S. District Court, Raleigh, NC for arraignment/plea. Signed by USMJ William A. Webb on 8/7/08. (Deputy Clerk - JJ,) (Entered: 08/07/2008)
08/18/2008	25	Minute Entry for proceedings held before Judge James C. Dever III in Raleigh: Deft sworn and found competent to proceed with plea. Arraignment as to Clifton Terelle McNeill (1) Count 1,2 held on 8/18/2008. Plea entered by Clifton Terelle McNeill (1) Guilty Count 1,2. (Sentencing set for 11/17/2008 09:00 AM in Raleigh - 7th Floor - Courtroom 1 before Judge James C. Dever III.) Deft remanded to custody of USM pending sentencing. (Court Reporter: Donna Tomawski) (Cress, L.) (Entered: 08/19/2008)
08/18/2008	26	MEMORANDUM OF PLEA AGREEMENT as to Clifton Terelle McNeill. (Cress, L.) (Entered: 08/19/2008)
11/05/2008	27	NOTICE OF HEARING as to Clifton Terelle McNeill Sentencing set for 11/18/2008 09:00 AM in Raleigh - 7th Floor - Courtroom 1 before Judge James C. Dever III. (Myers, J.) (Entered: 11/05/2008)

DATE	#	DOCKET TEXT
11/05/2008	28	MOTION to Continue Sentencing scheduled 11/18/08 by USPO as to Clifton Terelle McNeill. (Callihan, J.) (Entered: 11/06/2008)
11/06/2008	29	ORDER granting 28 Motion to Continue Sentencing scheduled 11/18/08 to the January 2009 Term of court in Raleigh as to Clifton Terelle McNeill (1). Signed by Judge James C. Dever III on 11/6/08. (Callihan, J.) (Entered: 11/06/2008)
11/06/2008		Reset Hearings as to Clifton Terelle McNeill: Sentencing set for 1/12/2009 09:00 AM in Raleigh - 7th Floor - Courtroom 1 before Judge James C. Dever III. (Callihan, J.) (Entered: 11/06/2008)
12/18/2008	30	MOTION for Writ of Habeas Corpus ad prosequendum by USA as to Clifton Terelle McNeill. (Jones, J.) (Entered: 12/19/2008)
12/18/2008	31	ORDER granting 30 Motion for Writ of Habeas Corpus ad prosequendum as to Clifton Terelle McNeill (1) Appearance is necessary on 1/12/09, at 9:00 a.m., in U.S. District Court, Raleigh, NC for sentencing.. Signed by USMJ James E. Gates on 12/18/08. (Jones, J.) (Entered: 12/19/2008)
12/24/2008	32	NOTICE OF HEARING as to Clifton Terelle McNeill: Sentencing set for 1/13/2009 09:00 AM in Raleigh - 7th

DATE	#	DOCKET TEXT
		Floor - Courtroom 1 before Judge James C. Dever III. (Cress, L.) (Entered: 12/24/2008)
01/05/2009	33	MOTION for Upward Departure by USA as to Clifton Terelle McNeill. (Watford-McKinney, Yvonne) (Entered: 01/05/2009)
01/06/2009	34	SENTENCING MEMORANDUM by Clifton Terelle McNeill. (Donahue, Devon) Modified on 1/7/2009 to correctly identify the document (Grady, B.). (Entered: 01/06/2009)
01/07/2009		NOTICE OF CORRECTION re: 34 Motion Memorandum in Support - Counsel, this document should not have been filed in as a motion as it is a sentencing memorandum. Deputy has corrected the docket text to reflect the true document title and terminated the motion. In future filings, please use the event code "Sentencing Memorandum (NOT SEALED)" which can be found under the Other Documents heading. There is no need for you to refile. Thank you. (Grady, B.) (Entered: 01/07/2009)
01/08/2009	35	MOTION to Withdraw Document 33 MOTION for Upward Departure by USA as to Clifton Terelle McNeill. (Attachments: # 1 Text of Proposed Order) (Watford-McKinney, Yvonne) (Entered: 01/08/2009)

DATE	#	DOCKET TEXT
01/13/2009	36	NOTICE OF APPEAL by Clifton Terelle McNeill (Donahue, Devon) (Entered: 01/13/2009)
01/13/2009	37	Transmission of Notice of Appeal and Docket Sheet as to Clifton Terelle McNeill to US Court of Appeals re 36 Notice of Appeal - Final Judgment. (Fogle, L.) (Additional attachment(s) added on 1/14/2009: # 1 Flattened Transmittal Form) (Grady, B.). (Entered: 01/13/2009)
01/13/2009	38	Minute Entry for proceedings held before Judge James C. Dever III: Sentencing held on 1/13/2009 for Clifton Terelle McNeill (1). Count(s) 1 and 2, Bureau of Prisons for 300 months on Count 1 and 240 months on Count 2 and shall run consecutively to term now serving in state custody. Supervised release of 5 years on Count 1 and 3 years on Count 2 and shall run concurrent with special conditions imposed. Special assessment of $200 imposed and no fine or restitution. Defendant remanded to custody of U.S. Marshal. Count 3 dismissed on motion of the government. (Court Reporter Donna Tomawski.) (Myers, J.) (Entered: 01/15/2009)

DATE	#	DOCKET TEXT
01/13/2009		Oral ORDER granting 35 Motion to Withdraw Document 33 as to Clifton Terelle McNeill (1). Entered by Judge James C. Dever III on 1/13/09. (Cress, L.) (Entered: 01/26/2009)
01/13/2009	40	JUDGMENT as to Clifton Terelle McNeill (1). Count 1: Bureau of Prisons - 300 months; Supervised release of 5 years with special conditions imposed; Count 2: Bureau of Prisons - 240 months, concurrent with Count 1. The total sentence of 300 months shall run consecutively to the state term defendant is presently serving. Supervised Release - 3 years, concurrent with Count 1, with special conditions. Count 3: Dismissed on motion of the government. Special assessment of $200 imposed, with no fine or restitution. Defendant remanded to custody of U.S. Marshal. Signed by Judge James C. Dever III on 1/13/09. (Cress, L.) (Entered: 01/26/2009)
01/22/2009	39	USCA Case Number as to Clifton Terelle McNeill 09-4083, Case Manager, Brian Bain for 36 Notice of Appeal - Final Judgment filed by Clifton Terelle McNeill. (Fogle, L.) (Entered: 01/22/2009)
01/26/2009	41	ORDER re: 40 Judgment as to Clifton Terelle McNeill. Signed by Judge James C. Dever III on 1/26/09. (Cress, L.) (Entered: 01/26/2009)

DATE	#	DOCKET TEXT
03/11/2009	42	ORDER of USCA (certified copy) regarding the deadline for the filing of transcripts as to Clifton Terelle McNeill re 36 Notice of Appeal - Final Judgment - Appeal number 09-4083. (Fogle, L.) (Entered: 03/11/2009)
04/14/2009	43	OFFICIAL TRANSCRIPT of Rule 11 as to Clifton Terelle McNeill for dates of August 18, 2008 before Judge Dever, re 36 Notice of Appeal - Final Judgment Court Reporter/Transcriber Donna J. Tomawski. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Please review Attorney obligations regarding the redaction of electronic transcripts of court proceedings available on the court's website. Redaction Request due 5/5/2009. Redacted Transcript Deadline set for 5/15/2009. Release of Transcript Restriction set for 7/13/2009. (Tomawski, Donna) (Entered: 04/14/2009)

DATE	#	DOCKET TEXT
04/14/2009	44	OFFICIAL TRANSCRIPT of Sentencing Hearing as to Clifton Terelle McNeill for dates of January 13, 2009 before Judge Dever, re 36 Notice of Appeal - Final Judgment Court Reporter/Transcriber Donna J. Tomawski. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Please review Attorney obligations regarding the redaction of electronic transcripts of court proceedings available on the court's website. Redaction Request due 5/5/2009. Redacted Transcript Deadline set for 5/15/2009. Release of Transcript Restriction set for 7/13/2009. (Tomawski, Donna) (Entered: 04/14/2009)
04/14/2009	45	NOTICE of Filing of Official Transcript 43 Transcript - Appeal, 44 Transcript - Appeal. Notice of Intent to Request Redaction should be filed within 7 calendar days. Parties must also submit a copy of the Notice of Intent to the reporter once it is filed with the court. (Tomawski, Donna) (Entered: 04/14/2009)

DATE	#	DOCKET TEXT
03/08/2010	46	PUBLISHED OPINION from Fourth Circuit Court of Appeals. AFFIRMED by published opinion, as to Clifton Terelle McNeill - re: 36 Notice of Appeal - Final Judgment. Appeal number 09-4083. (Fogle, L.) (Entered: 03/09/2010)
03/08/2010	47	JUDGMENT of USCA (certified copy) In accordance with the decision of this Court, the judgment of the District Court is AFFIRMED. This judgment shall take effect upon issuance of this Court's mandate, as to Clifton Terelle McNeill - re: 36 Notice of Appeal - Final Judgment. Appeal number 09-4083. (Fogle, L.) (Entered: 03/09/2010)
03/22/2010	48	STAY OF MANDATE - This Court's mandate has been stayed pending disposition of a petition for panel and/or en bane rehearing, as to Clifton Terelle McNeill - re: 36 Notice of Appeal - Final Judgment. Appeal number 09-4083. (Fogle, L.) (Entered: 03/23/2010)
04/05/2010	49	ORDER of USCA (certified copy) The Court DENIES the petition for rehearing and rehearing en bane, as to Clifton Terelle McNeill - re: 36 Notice of Appeal - Final Judgment. Appeal number 09-4083. (Fogle, L.) (Entered: 04/05/2010)

DATE	#	DOCKET TEXT
04/13/2010	50	MANDATE of USCA (certified copy) The judgment of this Court, entered 3/8/10, takes effect today. This constitutes the formal mandate of this Court, as to Clifton Terelle McNeill - re: 42 USCA Order, 46 Opinion from USCA, 48 Appeal Remark, 36 Notice of Appeal - Final Judgment, 47 USCA Judgment, 37 Transmission of Notice of Appeal and Docket Sheet to USCA, 39 USCA Case Number, 44 Transcript - Appeal, 43 Transcript - Appeal, 49 USCA Order. (Fogle, L.) (Entered: 04/13/2010)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

[Received Jan 4 2008]

WARRANT FOR ARREST
CASE NUMBER: 5:08-CR-2-D

UNITED STATES OF AMERICA

v.

CLIFTON TERELLE MCNEILL

To: The United States Marshal
and any Authorized United States Officer

YOU ARE HEREBY COMMANDED to arrest CLIFTON TERELLE MCNEIL and bring him or her forthwith to the nearest magistrate to answer a(n) X Indictment ___ Information ___Complaint ___Order of the Court ___ Violation Notice ___ Probation Violation Petition ___charging him or her with violation of ___United States Code, Section(s) ___

Ct. 1 – 18 U.S.C. § 922 (g) (1) – Felon in possession of a firearm.

Ct. 2 – 21 U.S.C. § 841 (a) (1) – Possession with intent to distribute.

Ct. 3 – 18 U.S.C § 924 (c) – Possession of firearm during and in relation to a drug trafficking crime.

DENNIS P. IAVARONE
Name of Issuing Officer

/s/ [Illegible]
Signature of Issuing Officer

Bail Recommended: DETENTION

CLERK
Title of Issuing Officer

January 3, 2008 RALEIGH, NC
Date and Location

by United States Attorney
Name of Judicial Officer

RETURN		
This warrant was received and executed with the arrest of the above named defendant at _____		
Date Received Date of Arrest 05-12-2008	Name and Title of Arresting Officer David Pulliam ATF	Name and Title of Arresting By Karen U. Thomas USMS, E/NC

[Filed Jun 05, 2008]
Dennis P. Iavarone, Clerk
US District Court, EDNC
By [Illegible] Dep Clk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:08-CR-2-D

UNITED STATES OF AMERICA

vs.

CLIFTON TERELLE MCNEILL
Defendant.

The Grand Jury charges that:

COUNT ONE

On or about February 28, 2007, in the Eastern District of North Carolina, the defendant, CLIFTON TERELLE MCNEILL, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting commerce, a firearm, that is, a Smith & Wesson, .38 caliber revolver, in violation of Title 18, United States Code, Sections 922(g) (1) and 924.

COUNT TWO

On or about February 28, 2007, in the Eastern District of North Carolina, the defendant, CLIFTON TERELLE MCNEILL, did knowingly, intentionally, and unlawfully possess with the intent to distribute approximately 3.1 grams of cocaine base (crack), a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841 (a) (1).

COUNT THREE

On or about February 28, 2007, in the Eastern District of North Carolina, the defendant, CLIFTON TERELLE MCNEILL, knowingly possessed a firearm, that is, a Smith and Wesson, .38 caliber revolver, during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States, to wit, possession with the intent to distribute approximately 3.1 grams of cocaine base (crack), a schedule II controlled substance, and did possess said firearm in furtherance of said drug trafficking crime, in violation of Title 18, United States Code, Section 924 (c) (1) (a) (i).

ALLEGATION OF PRIOR CONVICTION

As to Count Two:

For purposes of Title 21, United States Code, Sections 841 (b) and 851, the defendant, CLIFTON TERELLE MCNEILL, committed the violation alleged in Count Two after a prior conviction for a felony drug offense, as defined in Title 21, United States Code, Section 802(44), had become final.

[Illegible]

GEORGE E.B. HOLDING
United States Attorney

By: YVONNE V. WATFORD-MCKINNEY
YVONNE V. WATFORD-MCKINNEY
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:08-CR-2-D

UNITED STATES OF AMERICA

vs.

CLIFTON TERELLE MCNEILL

MEMORANDUM OF PLEA AGREEMENT

The United States of America ("United States"), by and through the United States Attorney for the Eastern District of North Carolina ("USA-EDNC"), and the Defendant, with the concurrence of the Defendant's Attorney, DEVON L. DONAHUE, have agreed that the above-captioned case should be concluded in accordance with this Memorandum of Plea Agreement as follows:

1. This Memorandum constitutes the full and complete record of the Plea Agreement. There are no other agreements between the parties in addition to or different from the terms herein.

2. The Defendant agrees:

   a. To plead guilty to Counts One and Two of the Indictment herein.

   b. To make restitution to any victim in whatever amount the Court may order, pursuant to 18 U.S.C. §§ 3663 and 3663A.

Said restitution shall be due and payable immediately.

c. To waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal whatever sentence is imposed, including any issues that relate to the establishment of the advisory Guideline range, reserving only the right to appeal from a sentence in excess of the applicable advisory Guideline range that is established at sentencing, and further to waive all rights to contest the conviction or sentence in any post-conviction proceeding, including one pursuant to 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea. The foregoing appeal waiver does not constitute or trigger a waiver by the United States of any of its rights to appeal provided by law.

d. To waive all rights, whether asserted directly or through a representative, to request or receive from the United States any records pertaining to the investigation or prosecution of this matter, except as provided in the Federal Rules of Criminal Procedure. This waiver includes, but is not limited to, rights conferred by the Freedom of Information Act and the Privacy Act of 1974.

e. To assist the United States in the recovery and forfeiture of any assets which facilitated and/or were acquired through

unlawful activities, including all such assets in which the Defendant has any interest or control.

f. To pay a special assessment of $100.00[1] for each count, pursuant to the provisions of 18 U.S.C. § 3013.

If the assessment is not paid at sentencing, the Defendant agrees (1) that the assessment is payable in full immediately, and (2) to participate in the Inmate Financial Responsibility Program while incarcerated.[2]

g. To complete and submit, if requested, a financial statement under oath to the Office of the USA-EDNC no later than two weeks after the entry of the guilty plea.

h. To abide by any conditions of release pending sentencing and report timely for service of sentence.

i. Whenever called upon to do so by the United States, (1) to disclose fully and truthfully in interviews with Government agents information concerning all conduct related to the Indictment and any other crimes of which the Defendant has knowledge, and (2) to testify fully and truthfully in any proceeding. These obligations are continuing ones. The Defendant agrees that all of these statements can be used against the Defendant at trial if the Defendant

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[1] If felony; $25 for Class A misdemeanors; $10 for Class B misdemeanors.

[2] Only for absolutely indigent defendants, with no family resources available.

withdraws from this plea agreement or is allowed to withdraw the guilty plea.

j. If the Defendant provides false, incomplete, or misleading information or testimony, this would constitute a breach of this Agreement by the Defendant, and the Defendant shall be subject to prosecution for any federal criminal violation. Any information provided by the Defendant may be used against the Defendant in such a prosecution.

k. To submit to a polygraph examination whenever requested by the Office of the USA-EDNC. The results of these examinations will be admissible only at the Defendant's sentencing, and at any hearing as to whether there has been a breach of this agreement. The United States may rely on these results in determining whether the Defendant has fulfilled any obligation under this Agreement.

l. To knowingly and expressly waive any and all rights, under the Fifth and Sixth Amendments to the United States Constitution and any cases interpreting them, to have the existence and applicability of any prior convictions (1) charged in the indictment, (2) submitted to a jury, and (3) proved beyond a reasonable doubt. The defendant hereby consents to having the existence and applicability of any such convictions decided by the sentencing judge based on a preponderance of the evidence. The defendant reserves the right to contest at sentencing the existence of any such

prior conviction and whether such conviction qualifies to increase the statutory minimum and maximum sentence, but consents to the resolution of any such objection by the sentencing judge using a preponderance-of-the-evidence standard.

3. The Defendant understands, agrees, and admits:

a. That as to each Count of the Indictment to which the Defendant is pleading guilty, the charge, code section, elements, and applicable penalties are as follows:

Count One

(1) Felon of a firearm

(2) Code section violated: 18 U.S.C. §922 (g)(1)

(3) Elements:

First: That prior to February 28, 2007, the defendant had been convicted of an offense punishable by imprisonment for a term exceeding one year;

Second: That on or about February 28, 2007, the defendant knowingly possessed a firearm, to wit, a Smith & Wesson, .38 caliber revolver; and

Third: That the defendant possessed the firearm in and affecting commerce. and

(4) Maximum term of imprisonment: 10 years

(5) Minimum term of imprisonment: N/A

(6) Maximum term of supervised release: 3 years

(7) Maximum term of imprisonment upon revocation of supervised release: 2 years

(8) Maximum fine: $ 250,000.00

(9) Restitution pursuant to 18 U.S.C. §§ 3663 and 3663A, and as agreed to in Paragraph 2.b. above.

(10) Special assessment: $100.00

If the defendant's criminal history subjects the defendant to the sentencing enhancement of 18 U.S.C. § 924(e), then the applicable penalties in lieu of (4) through (7) above are as follows:

Maximum term of imprisonment: Life

Minimum term of imprisonment: Fifteen (15) years

Maximum term of supervised release: Five (5) years

Maximum term of imprisonment upon revocation of supervised release: Five (5) years

Maximum fine: $250,000

Restitution pursuant to 18 U.S.C. §§ 3663 and 3663A, and as agreed to in Paragraph 2(b) above.

Special assessment: $100.00

Count Two

(11) Possession with intent to distribute cocaine base

(12) Code section violated: 21 U.S.C. §841 (a)(1)

(13) Elements:

First: That on or about February 28, 2007, the defendant knowingly and intentionally possessed 3.1 grams of cocaine base; and

Second: That the defendant possessed the cocaine base with the intent to distribute it.

(14) Maximum term of imprisonment: 20 years

(15) Minimum term of imprisonment: N/A

(16) Maximum term of supervised release: 3 years

(17) Maximum term of imprisonment upon revocation of supervised release: 2 years

(18) Maximum fine: $ 1,000,000.00

(19) Restitution pursuant to 18 U.S.C. §§ 3663 and 3663A, and as agreed to in Paragraph 2.b. above.

(20) Special assessment: $100.00

Total Statutory Maximum Sentence: 30 Years Imprisonment; 6 Years Supervised Release; $_1,250,000.00 Fine; $_200.00 Special Assessment.

b. That any sentence imposed will be without parole.

c. That the Court will take into account, but is not bound by, the applicable United States Sentencing Guidelines, that the sentence has not yet been determined by the Court, that any estimate of the sentence received from any source is not a promise, and that even if a sentence up to the statutory maximum is imposed, the Defendant may not withdraw the plea of guilty.

d. That, unless Defendant is found unable to pay, the Court will impose a fine, and failure to pay it will subject Defendant to additional criminal and civil penalties pursuant to 18 U.S.C. §§ 3611-14.

4. The United States agrees:

a. At sentencing, it will dismiss Count Three of the Indictment.

b. That it reserves the right to make a sentence recommendation.

c. That it reserves the right at sentencing to present any evidence and information pursuant to 18 U.S.C. § 3661, to offer argument or rebuttal, to recommend imposition of restitution, and to respond to any motions or objections filed by the Defendant.

d. That the USA-EDNC will not further prosecute the Defendant for conduct constituting the basis for the Indictment; however, this obligation is limited solely to the USA-EDNC and does not bind any other state or federal prosecuting entities.

e. That it will make known to the Court at sentencing the full extent of the Defendant's

cooperation, but the United States is not promising to move for departure pursuant to U.S.S.G. §5K1.1, 18 U.S.C. § 3553(e), or Fed. R. Crim. P. 35.

f. Pursuant to U.S.S.G. §1B1.8, that self-incriminating information provided by the Defendant pursuant to this Agreement shall not be used against the Defendant in determining the applicable advisory Guideline range, except as provided by §1B1.8 and except as stated in this Agreement. The United States will not, however, withhold from the United States Probation Office any evidence concerning relevant conduct.

g. That the USA-EDNC agrees not to share any information provided by the Defendant pursuant to this Agreement with other state or federal prosecuting entities except upon their agreement to be bound by the terms of this Agreement.

5. The parties agree to the following positions as to the below-listed sentencing factors only, which are not binding on the Court in its application of the advisory Guideline range; provided that if Defendant's conduct prior to sentencing changes the circumstances with respect to any such factors, the United States is no longer bound to its positions as to those factors:

a. A downward adjustment of 3 levels for acceptance of responsibility is warranted under U.S.S.G. §3E1.1.

This the 7th day of July, 2008.

GEORGE E. B. HOLDING
United States Attorney

By: CLIFTON TERELLE MCNEILL
CLIFTON TERELLE MCNEILL
Defendant

By: YVONNE V. WATFORD-MCKINNEY
YVONNE V. WATFORD-MCKINNEY
Assistant United States Attorney
Criminal Division

By: DEVON L. DONAHUE
DEVON L. DONAHUE
Attorney for the Defendant

APPROVED, this 18 day of August, 2008.

By: HONORABLE JAMES C. DEVER, III
HONORABLE JAMES C. DEVER, III
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:08-CR-2-D

UNITED STATES OF AMERICA

v.

CLIFTON TERELLE MCNEILL

SENTENCING MEMORANDUM

The Defendant, Clifton Terelle McNeill, by and through undersigned counsel, submits the following Sentencing Memorandum in support of a sentence of 188 months, a sentence at the low end of the advisory guideline range identified in Mr. McNeill's Presentence Report (PSR). Such a sentence is consistent with the principles set forth in 18 U.S.0 § 3553(a) and consistent with *United States v. Booker*, 543 U.S. 220 (2005), *United States v. Rita*, 127 S. Ct. 2456 (2007), and *Gall v. United States*, 128 S.Ct. 586, 596-97 (2007), and is a sentence that is "sufficient but not greater than necessary" to achieve the goals of sentencing.

STATEMENT OF CASE

On February 28, 2007, officers from the Fayetteville Police Department gave chase to Clifton McNeill after he jumped from a truck during a traffic stop. Upon apprehending Mr. McNeill, police discovered he had in his possession a .38 caliber revolver. He also had 3.1 grams of crack cocaine with him. Almost a

year later, on January 2, 2008, Mr. McNeill was named in a three count federal indictment alleging he possessed a firearm, possessed a controlled substance with the intent to distribute it, and possessed a firearm in connection with a drug distribution offense. On August 18, 2008, Mr. McNeill pleaded guilty, pursuant to a plea agreement, to possessing a firearm in violation of Title 18 U.S.C. § 922g, and possessing 3.1 grams of cocaine with the intention of distributing it, in violation of Title 21 U.S.C. 841(a)(1).

At the request of the United States Office of Probation, Mr. McNeill's sentencing hearing was continued from November 18, 2008 to January 12, 2009. According to the PSR draft, issued on December 17, 2008, Mr. McNeill's advisory guideline range is from 188 months to 235 months. This range is premised on the determination that Mr. McNeill qualifies as an Armed Career Criminal because, in addition to having two prior violent felony convictions, he has several "serious drug offense" convictions.

If Mr. McNeill were not scored as an Armed Career Criminal, he would be scored as a Career Offender, and his advisory guideline range would be from 151 to 188 months.

ARGUMENT

In advancing a sentence pursuant to United States Sentencing Guide (U.S.S.G.) § 4B1.4, the PSR is relying on convictions Mr. McNeill received in 1991 when he was just 16 years old. On November 17, 1992, Mr. McNeill was convicted of three separate counts of selling and possessing with the intent to sell controlled substances. These offenses constituted Class H felonies in North Carolina. However, because these convictions are so old, Mr. McNeill was not

sentenced pursuant to the North Carolina Structured Sentencing Act that went into effect on December 1, 1995. As a result, the maximum statutory sentences for these offenses was at least 10 years and they constitute "serious drug offenses" under Title 18 U.S.C. 924 (e)(2)(A). With the advent of the North Carolina Structured Sentencing Act, these precise offenses no longer carry such an extensive punishment. In fact, for the past 12 years, the longest term of imprisonment someone could get for a Class H felony is from 20-25 months. This much exposure only applies if the defendant's case includes the requisite aggravating factors and the defendant falls in the highest criminal history category. Had Mr. McNeill been sentenced under the Structured Sentencing Act for the offenses at issue, he most likely would have fallen in a very low criminal history category as these were his first convictions, and his greatest exposure for these convictions most likely would have been closer to 6-8 months. No matter what the circumstances, in no case would his exposure have exceeded 25 months.

Section 3553(a)(6) directs the sentencing court to avoid a sentence that creates unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. In reality, in light of the North Carolina Structured Sentencing Act, prior drug distribution convictions rarely if ever expose defendants in the Eastern district of North Carolina to an enhancement under U.S.S.G. § 4B1.4 or 924(e). For more than 12 years, these types of convictions simply have not come close to constituting "serious drug offenses." If these offenses are used to sentence Mr. McNeill in accordance with U.S.S.G. § 4B1.4, then he will suffer a significant sentencing consequence few others do.

Additionally, older crimes committed when the defendant was very young routinely have a less significant impact on one's sentence as compared to the more recent offenses committed when a defendant is well into adulthood. In this case, Mr. McNeill's older crimes, committed when he was just 16 years old, are disproportionately and unfairly ratcheting up his sentence, and driving the advisory guideline range.

The defense does not dispute that Mr. McNeill qualifies as a Career Offender under U.S.S.G. § 4B1.1. In applying the chart outlined in U.S.S.G. § 4B1.1(b), Mr. McNeill's base offense level would be 32. Accounting for acceptance (adjusted offense level 29), and considering that Mr. McNeill falls in criminal history category VI, his advisory guideline range would be from 151-188 months.

The defense is respectfully requesting that the court impose a sentence of 188 months, that is a sentence at the high end of the advisory Career Offender guideline range. This sentence is sufficient, but not greater than necessary to satisfy the goals of sentencing.

In addition to the above mentioned request, the defense is hereby respectfully asking this Court to impose a minor 36 day variance to account for the brief period of time between the original sentencing date and the current sentencing date. Because Mr. McNeill is currently in state custody, his federal sentence will not begin to run until the Court announces his sentence. His hearing was continued, through no fault of his or his attorney, so as to give the Probation Officer adequate time to prepare his PSR. Had he been sentenced in November as previously scheduled, his sentence would have begun

to run then. A minor variance will help account for this brief delay.

CONCLUSION

Mr. McNeill hereby respectfully asks this Court to sentence him in accordance with U.S.S.G. § 4B1.1 (Career Offender) as opposed to U.S.S.G. § 4B1.4 (Armed Career Criminal). Otherwise, Mr. McNeill will suffer an unusually harsh sentencing disparity as a result of old criminal convictions he sustained at age 16. We also ask this Court to impose a slight variation to account for the brief sentencing delay in this case.

Respectfully requested this 6th day of January, 2009.

THOMAS P. McNAMARA
Federal Public Defender

/s/ *Devon L. Donahue*
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VA State Bar No. 36158
LR 57.1 Counsel Appointed

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon:

YVONNE V. WATFORD-MCKINNEY
Assistant United States Attorney
Suite 800, Federal Building
310 New Bern Avenue
Raleigh, NC 27601-1461

by electronically filing the foregoing with the Clerk of Court on January 6, 2009, using the CM/ECF system which will send notification of such filing to the above.

This the 6th day of January, 2009.

/s/ *Devon L. Donahue*
DEVON L. DONAHUE
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VA State Bar No. 36158
LR 57.1 Counsel Appointed

UNITED STATES DISTRICT COURT

Eastern District of North Carolina

UNITED STATES OF AMERICA
V.
CLIFTON TERELLE MCNEILL

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:08-CR-2-1-D

USM Number:51154-056

Devon L. Donahue
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) 1 and 2 of the Indictment

☐ pleaded nolo contendere to count(s)_____ which was accepted by the court.

☐ was found guilty on count(s)_____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(1) and 924	Felon in Possession of a Firearm	2/28/2007	1
21 U.S.C. § 841(01)	Possession With the Intent to Distribute Approximately 3.1 Grams of Cocaine Base (Crack)	2/28/2007	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)_____

☑ Count(s) 3 ☑ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Sentencing Location:
Raleigh, North Carolina

1/13/2009
Date of Imposition of Judgment

/s/ James Dever
Signature of Judge

James C. Dever III, United States District Judge
Name and Title of Judge

1/13/2009
Date

DEFENDANT: CLIFTON TERELLE MCNEILL
CASE NUMBER: 5:08-CR-2-1-D

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Count 1 - 300 months

Count 2 - 240 months and shall run concurrent with count 1

This sentence shall run consecutively to the state term the defendant is now serving. The court orders the defendant provide support for all dependents while incarcerated.

☑ The court makes the following recommendations to the Bureau of Prisons:

The court recommends that the defendant receive intensive substance abuse treatment, mental health treatment, vocational training and educational opportunities. The court recommends that he serve his term in FC1, Bennettsville, South Carolina or as close as possible to Cumberland County.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐a.m. ☐p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before p.m. on _____

☐ as notified by the United States Marshal. ☐ Or

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a_____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: CLIFTON TERELLE MCNEILL
CASE NUMBER: 5:08-CR-2-1-D

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Count 1 - 5 years Count 2 - 3 years and shall run concurrent with Count 1

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☑ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer.
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five (5) days of each month.
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4. The defendant shall support the defendant's dependents and meet other family responsibilities.

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6. The defendant shall notify the probation officer at least then (10) days prior to any change of residence or employment.

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician.

8. The defendant shall not frequent places where controlled substances are illegally sold, used distributed, or administered, or other places specified by the court.

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10. The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: CLIFTON TERELLE MCNEILL
CASE NUMBER: 5:08-CR-2-1-D

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation office.

The defendant shall participate as directed in a program approved by the probation office for the treatment of narcotic addiction, drug dependency, or alcohol dependency which will include urinalysis testing or other drug detection measures and may require residence or participation in a residential treatment facility.

The defendant shall consent to a warrantless search by a United States probation officer or, at the request of the probation officer, any other law enforcement officer, of the defendant's person and premises, including any vehicle, to determine compliance with the conditions of this judgment.

The defendant shall cooperate in the collection of DNA as directed by the probation.

DEFENDANT: CLIFTON TERELLE MCNEILL
CASE NUMBER: 5:08-CR-2-1-D

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$	$

☐ The determination of restitution is deferred until. *An Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(0, all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$0.00	$0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(0. All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

  ☐ the interest requirement is waived for the ☐ fine ☐ restitution.

  ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: CLIFTON TERELLE MCNEILL
CASE NUMBER: 5:08-CR-2-1-D

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C,☐ D, or ☐ F below); or

C ☐ Payments in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payments in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

The special assessment in the amount of $200.00 shall be due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

[Filed 01/13/09]

NO. 5:08-CR-2-D

UNITED STATES OF AMERICA

v.

CLIFTON TERELLE MCNEILL

NOTICE OF APPEAL

Pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure, NOTICE IS HEREBY GIVEN that the defendant, Clifton Terelle McNeill, hereby appeals to the Fourth Circuit Court of Appeals from the judgment entered in this court in the above-captioned case. As judgment was entered by the Honorable Judge James C. Dever, III on January 13, 2009, this notice is therefore filed within the time specification established in Rule 4(b).

Respectfully requested this 13th day of January, 2009.

THOMAS P. McNAMARA
Federal Public Defender

/s/ Devon L. Donahue
DEVON L. DONAHUE
Assistant Federal Public Defender
Attorney for Defendant
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Virginia Bar No. 36158
LR 57.1 Counsel Appointed

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon:

YVONNE V. WATFORD-MCKINNEY
Assistant United States Attorney
Suite 800, Federal Building
310 New Bern Avenue
Raleigh, NC 27601-1461

by electronically filing the foregoing with the Clerk of Court on January 13, 2009, using the CM/ECF system which will send notification of such filing to the above.

This the 13th day of January, 2009.

/s/ Devon L. Donahue
DEVON L. DONAHUE
Assistant Federal Public Defender
Attorney for Defendant
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Virginia Bar No. 36158
LR 57.1 Counsel Appointed

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION

No. 5:08-CR-2-D-1

UNITED STATES OF AMERICA

v.

CLIFTON TERELLE MCNEILL,
Defendant.

ORDER

On August 18, 2008, Clifton Terelle McNeill ("McNeill" or "defendant") pleaded guilty, pursuant to a plea agreement, to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (count one) and possession with intent to distribute approximately 3.1 grams of cocaine base in violation of 21 U.S.C. § 841(a)(1) (count two)[1] Because McNeill is an armed career criminal, the statutory minimum penalty for being a felon in possession of a firearm is fifteen years' imprisonment and the maximum penalty is life imprisonment. *See* 18 U.S.C. § 924(e)(1). The statutory maximum for possession with intent to distribute 3.1 grams of cocaine base is 20 years' imprisonment.

[1] McNeill was also charged with possession of a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(a)(i) (count three). On August 7, 2008, the government moved orally for the court to dismiss count three [D.E. 22]. At sentencing, the court dismissed this count.

On January 13, 2009, the court sentenced McNeill to 300 months' imprisonment on count one and 240 months' imprisonment on count two to be served consecutively to the sentence he is currently serving under the custody of the state of North Carolina. The court enters this order to explain McNeill's sentence.

I.

On February 28, 2007, a Fayetteville Police officer observed a car driven by McNeill travel through a red light. Presentence Investigation Report 5[hereinafter "PSR"].[2] The officer attempted to initiate a traffic stop, but McNeill evaded the officer for several miles. *Id.* The car then made an abrupt stop, and three males fled from the vehicle. *Id.* After a brief foot chase, an officer tackled McNeill. *Id.* Officers apprehended McNeill and then detected a .38-caliber Smith & Wesson revolver lying on the ground underneath McNeill's body. *Id.* A search of McNeill revealed 3.1 grams of cocaine base (crack), packaged for distribution, along with $369 in U.S. currency. Based on a purchase price of $200 per gram, the currency converts to 1.85 grams of cocaine base for a total of 4.95 grams. *Id.*

On January 2, 2008, McNeill was indicted for being a felon in possession of a firearm, possession with intent to distribute approximately 3.1 grams of cocaine base, and possession of a firearm during and in relation to a chug trafficking crime. *See* 18 U.S.C. §§ 922(g)(1), 924(c)(1)(a)(i); 21 U.S.C. § 841(a)(1). On August 18, 2008, McNeill pleaded guilty to the first two offenses. On January 13, 2009, the court held a

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[2] The court accepts as accurate the PSR, except as to objections set forth in the addendum. *See* Fed. R. Crim. P. 32(i).

sentencing hearing. The court recounts its rulings from that hearing in this order.

The Supreme Court has described the process for imposing a sentence under the now-advisory sentencing guidelines as follows:

> [A] district court should begin all sentencing proceedings by correctly calculating the applicable [U.S. Sentencing] Guidelines range. As a matter of administration and to swim nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the [18 U.S.C.] § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance . . . . [A] major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.

Gall v. United States, 128 S. Ct. 586, 596-97 (2007) (citations and footnote omitted); *see also Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007) ("[W]hile the statute still requires a court to give respectful

consideration to the Guidelines, [*United States v.*] *Booker*[, 543 U.S. 220, 245-46 (2005),] permits the court to tailor the sentence in light of other statutory concerns as well." (citations and quotation omitted)); *Rita v. United States*, 127 S. Ct. 2456, 2469 (2007) ("The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the [United States Sentencing] Commission or the appeals court."); *Cunningham v. California*, 549 U.S. 270, 286-87 (2007);[3] *United States v. Evans*, 526 F.3d 155, 160-62 (4th Cir. 2008); *United States v. Pauley*, 511 F.3d 468, 473-74 (4th Cir. 2007). The court recognizes its duty within this framework to "make an individualized assessment based on the facts presented," *Gall*, 128 S. Ct. at 597, and to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [the sentencing statute]," 18 U.S.C. § 3553(a). *See Kimbrough*, 128 S. Ct. at 570.

A.

The court begins by calculating the advisory guideline range. *See, e.g., Gall*, 128 S. Ct. at 596. The base offense level for McNeill's firearm possession offense is twenty-four. U.S.S.G. § 2K2.1(a)(2). However, because the court finds McNeill to be an armed career criminal, and he used or possessed the weapon (count one) in connection with a controlled substance offense

---

[3] The Supreme Court decided *Spears v. United States*, No. 08-5721, __ S. Ct. __ 2009 WL 129044 (Jan. 21, 2009) (per curiam), and *Nelson v. United States*, No. 08-5657, __ S. Ct. __ 2009 WL 160585 (Jan. 26, 2009) (per curiam), after this court sentenced McNeill, but before this court signed this order. The Court's decision in *Spears* and *Nelson* again emphasize a district court's sentencing discretion.

(count two), his base offense level is thirty-four. *See id.* § 4B1.4(b)(3)(A). Because the controlled substance offense is treated as an adjustment to the guideline range applicable for the felon-in-possession offense, the counts are grouped together. Therefore, the offense level for the grouped counts is the highest offense level for the individual counts: thirty-four for the firearm offense. *See* U.S.S.G. §§ 3D1.2(c), 3D1.3(a). McNeill's acceptance of responsibility yields a three-level reduction. *See id.* § 3E1.1(a)—(b). Accordingly, the total offense level is thirty-one. *See* PSR ¶ 51.

McNeill's criminal history reveals a disturbing pattern of violence and an unwillingness to conform to society's mores. *See* PSR ¶¶ 8-27. McNeill's criminal exploits began early in his life with state convictions for four drug-related felonies and larceny of a motor vehicle at the age of sixteen. *id.* ¶¶ 8-12. The offenses were separated by intervening arrests but combined into a single sentence of ten years. *See id.* While serving this sentence, he was paroled three times, and his parole was revoked twice. *Id.*

One of these revocations resulted from an incident on August 16, 1994. On that date, McNeill drove up beside three men in a truck. *Id.* ¶¶ 16. McNeill exchanged no words with them but instead fired twelve shots at the men. *Id.* Two of the victims sustained gunshot wounds to their legs. *Id.* When he was arrested on September 11, 1994, McNeill possessed a felonious amount of cocaine. *See id.* He was convicted of possession with intent to manufacture/sell/deliver cocaine and assault with a deadly weapon (serious injury) in state court. *Id.* ¶¶ 16-17. At sentencing, he also pleaded guilty to an earlier armed robbery. *See id.* ¶ 18.

McNeill committed the instant offenses on February 28, 2007. At that time, McNeill had only been released from custody on a separate drug sentence for seven months. *See id.* ¶¶ 20, 26. On March 20, 2007, McNeill was convicted of possession of a stolen vehicle, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. *Id.* ¶¶ 19, 23. The latter offense took place on January 14, 2005, and involved McNeill and others' failed attempt to break into a residence and rob its occupants of illegal drugs and money. *Id.* ¶ 23. McNeill sustained a gunshot wound, and a victim died at the scene from being shot. *Id.* McNeill is serving a North Carolina sentence on these convictions and is not expected to be released until July 4, 2012. *Id.*

McNeill's criminal history scores sixteen points. *Id.* ¶ 25. Because McNeill committed the instant offenses less than two years after his release from custody, two points are added. *See* U.S.S.G. § 4A1.1(e); PSR ¶ 26. A criminal history point total of eighteen establishes a criminal history category of VI. *See* U.S.S.G. § 5A (sent'g table); PSR ¶ 27.[4] McNeill's armed career criminal status also warrants a criminal history category of VI. *See* U.S.S.G. § 4B1 .4(c)(2); PSR ¶ 27. Alternatively, McNeill qualifies as a career offender because of the controlled-substance count, which also calls for a criminal history category of VI. *See* U.S.S.G. § 4B1.1(b); PSR ¶ 27. Thus, with a total offense level of thirty-one and a criminal history category of VI, the court calculates the advisory sentencing guideline range to be 188 to 235 months. U.S.S.G. § 5A (sent'g table).

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[4] Thirteen or more criminal history points results in a criminal history category of VI. *See* U.S.S.G. § 5A (sent' g table).

1.

McNeill first objects to possessing the firearm in connection with another felony offense. PSR Add. ¶ 1 He does not, however, dispute that he possessed the firearm or that he possessed the cocaine base. Indeed, he pleaded guilty to both acts.

The court overrules the objection and finds that McNeill's possession of 3.1 grams of cocaine base is "another felony offense" for the purposes of section 2K2.1(b)(6) and a "controlled substance offense" for the purposes of section 4B1.4(b)(3). The guidelines define "controlled substance offense" as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b). "Another felony offense" means "any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained." *Id.* § 2K2.1, cmt. n.14(C). Possession with intent to distribute cocaine base is a violation of 21 U. S.C. § 841(a)(1), and carries a maximum sentence of twenty years. *See* 21 U.S.C. § 841(b)(1)(C). McNeill pleaded guilty to possession with intent to distribute cocaine base. *See* PSR ¶¶2, 4. Accordingly, McNeill committed "another felony offense" and a "controlled substance offense."

The only basis for McNeill's objection is that he did not possess the firearm "in connection with" the other offense. The "in connection with" requirement is met

"if the weapon facilitates or has a tendency to facilitate the [other] offense." *United States v. Blount*, 337 F.3d 404, 411 (4th Cir. 2003) (citation & quotations omitted). For drug offenses, the adjustment applies if "a firearm is found in close proximity to drugs . . . because the presence of the firearm has the potential of facilitating another felony offense." U.S.S.G. § 2K2.1, cmt. n.14(B). Possessing a firearm for "protection or to embolden the actor" also satisfies the requirement. *See United States v. Lipford*, 203 F.3d 259, 266 (4th Cir. 2000) (discussing 18 U.S.C. § 924). "Thus, a district court may find that a firearm is 'used' 'in connection with' another felony offense if it facilitates or has a tendency to facilitate the felony offense." *United States v. Garnett*, 243 F.3d 824, 828-29 (4th Cir. 2001) (citing *Smith v. United States*, 508 U.S. 223, 237 (1993)). Still, "the firearm must have some purpose or effect with respect to the . . . crime; its presence or involvement cannot be the result of accident or coincidence." Smith, 508 U.S. at 238; *see Blount*, 337 F.3d at 411; *cf Lipford*, 203 F.3d at 266 (stating that presence of firearm cannot be merely "spontaneous or coincidental").

McNeill possessed the weapon at the same time he possessed approximately 3.1 grams of cocaine base, packaged for distribution. *See* PSR ¶ 5. Defendant's conduct at the time of his arrest suggests, at the very least, that the firearm "ha[d] a tendency to facilitate" a drug offense. The court finds that McNeill had the weapon for protection if needed while possessing the crack cocaine. Further, McNeill's history of narcotics possession and distribution negates any inference that his possession of the firearm was spontaneous or accidental. Thus, McNeill meets the "in connection with" requirement under sections 2K2.1 and 4B1.2(b), and his objection is overruled.

2.

Next, McNeill objects to applying the Armed Career Criminal Act ("ACCA") to him. PSR Add. ¶ 2. He also argues that applying the ACCA to him creates the type of disparity frowned upon by 18 U.S.C. § 3553(0(6). *See* Def.'s Mem. 3. McNeill contends that the majority of his predicate convictions were for drug-related offenses committed before the North Carolina Structured Sentencing Act ("Act") was enacted. He argues that if he had been convicted of many of these offenses after the Act went into effect on December 1, 1995, the offenses would not meet the statutory definition of "serious drug offense" under 18 U.S.C. § 924(e)(2) in the ACCA. *See* Def.'s Mem. 2-3.

The ACCA defines "serious drug offense" as:

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense wider State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. § 924(e)(2). According to McNeill, his convictions detailed in paragraphs 8, 11, and 16 of the PSR were Class H felonies, which under North Carolina's current sentencing scheme would only be punishable by at most twenty-five months' imprison-

ment. Def.'s Mem. 2. Thus, had the offenses occurred after December 1, 1995, they would not be considered "serious drug offenses." *Id.*

The court rejects the argument. McNeill chose to commit the offenses when he did and was convicted and sentenced in North Carolina shortly thereafter. Under the ACCA, a court looks to the maximum sentences for the offenses at issue at the time of the offense. *See, e.g., United States v. Williams*, 57 F. App'x 553, 556 (4th Cir. 2003) (per curiam) (unpublished) (analyzing North Carolina's sentencing scheme). Thus, McNeill's prior drug convictions are serious drug offenses, and McNeill is properly designated an armed career criminal under 18 U.S.C. § 924(e).

Given that McNeill is an armed career criminal, and that he used or possessed the firearm in connection with a controlled substance offense, the offense level is thirty-four. See U.S.S.G. § 4131.4(b)(3)(A); PSR 1149. Because McNeill accepted responsibility for the instant offenses, his offense level is reduced by three levels, for a total offense level of thirty-one. *See* U.S.S.G. § 3E1. 1(a)-(b); PSR ¶¶ 50-51. Based on a total offense level of thirty-one and a criminal history category of VI, McNeill's advisory guideline range for imprisonment is 188 to 235 months. *See* U.S.S.G. § 5A (sent'g table); PSR ¶ 55.

B.

Having calculated the advisory guideline range, the court next considers whether an upward departure is warranted. *See, e.g., Gall*, 128 S. Ct. at 596-97; *Rita*, 127 S. Ct. at 2465; *United States v. Davenport*, 445 F.3d 366, 370 (4th Cir. 2006), *overruled in part on unrelated grounds by Irizarry v. United States*, 128 S. Ct. 2198, 2203-04 (2008). In this case, the PSR notes

that the court may wish to upwardly depart because McNeill's criminal history category substantially underrepresents the seriousness of his criminal history or his likelihood of recidivism. *See* PSR ¶ 73 (citing U.S.S.G. § 4A1.3). The PSR provided sufficient notice pursuant to Rule 32 for the court to consider an upward departure under section 4A1.3. *See* Fed. R. Crim. P. 32(h); *United States v. Abbott*, 221 F. App'x 186, 189-90 (4th Cir. 2007) (per curiam) (unpublished).

The court considers whether an upward departure is appropriate under section 4A1.3 because McNeill's criminal history category substantially underrepresents the seriousness of his criminal history or his likelihood ofrecidivism. Under section 4A1.3, "[i]freliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted." U.S.S.G. § 4A1.3(a)(1). In determining whether to depart, a court should bear in mind that "[a] criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur." *Id.* § 4A1.3, cmt. background. The commentary also indicates that a court may consider prior instances of lenient treatment in judging a defendant's likelihood of recidivism. *See id.*

McNeill has a long and unrelenting history of serious criminal conduct. *See* PSR ¶¶8-23. McNeill has engaged in many types of criminal behavior, with an emphasis on illegal drugs and violence. *See, e.g., id.* ¶¶ 8-11, 16-18, 20, 23. McNeill has been convicted of at least twenty-one criminal offenses. *See id.* ¶¶8-23. He has fourteen felony convictions. See id. 8-12, 16-20,

23. He has multiple unscored offenses. *See id.* ¶¶ 9, 10, 13-15, 21-22. His criminal activity had led to him and three other individuals being shot, leaving one dead. *See id.* ¶¶ 16, 23.

The North Carolina criminal justice system has not deterred McNeill. A sentence of ten years' imprisonment at the age of sixteen years old did not alter McNeill's behavior. *See id.* ¶¶ 8-12. Instead, his crimes grew more violent. *See id.* ¶ 17. Indeed, after serving another term of incarceration, he committed the instant offenses. *See id.* ¶ 26. He is now in custody serving a state sentence until 2012. *See id.* ¶ 23. When incarcerated and on parole, McNeill has continued to engaged in inappropriate and illegal conduct. *See id.* ¶¶ 8-12, 23. For example, during his current state sentence, McNeill has already incurred four disciplinary rule violations, including possessing an illegal substance. *Id.* 23. In its discretion, the court finds that an upward departure is appropriate under section 4A1.3.

A court that elects to upwardly depart under section 4A1.3 must move horizontally across successive criminal history categories up to category VI, and, if category VI is inadequate, is to then vertically traverse to successively higher offense levels. *See, e.g.*, U.S.S.G. § 4A1 .3(a)(4); *United States v. Dalton*, 477 F.3d 195, 200 (4th Cir. 2007). That is, up to criminal history category VI, a court must "determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's." U.S.S.G. § 4A1.3(a)(4)(A). From category VI, the court must "structure the departure by moving incrementally down the sentencing table

to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case." *Id.* § 4A1.3(a)(4)(B). A court is free to depart more than one category or level. *See, e.g.*, *Dalton*, 477 F.3d at 199. Further, a court need not "go through a ritualistic exercise in which it mechanically discusses each criminal history category [or offense level] it rejects en route to the category [or offense level] that it selects." *Id.* (quotation omitted).

The court finds that criminal history category VI is wholly inadequate to capture the seriousness of McNeill's criminal history and his near certain likelihood of recidivism, including a likelihood to commit other violent crimes. Because category VI is inadequate, the court moves down the sentencing table and analyzes successive offense levels.

The court finds that offense level thirty-four contains the guideline range most appropriate for this case. In making this finding, the court has considered offense levels thirty-two and thirty-three and finds that they do not adequately reflect the seriousness of McNeill's criminal history or the near certain likelihood that he will commit other crimes, including violent crimes. *See, e.g.*, *Evans*, 526 F.3d at 160, 165-66 (affirming fourteen-level upward departure); *see also United States v. Smolka*, 261 F. App'x 578, 583 (4th Cir. 2008) (per curiam) (unpublished); *United States v. Sampson*, 245 F. App'x 263, 267-68, 271 (4th Cir. 2007) (per curiam) (unpublished); *United States v. Lawrence*, 349 F.3d 724, 727-28 (4th Cir. 2003). Coupling this new offense level with criminal history category VI, McNeill's advisory guideline range for count one becomes 262 to 327 months' imprisonment. *See* U.S.S.G. § 5A (seneg table). Count two is capped

statutorily at 240 months' imprisonment. *See* 18 U.S.C. § 841(b)(1)(C).

C.

The court next considers whether a sentence within this new advisory guideline range would serve the factors set forth in 18 U.S.C. § 3553(a). *See Gall*, 128 S. Ct. at 596-97. The court recognizes that it must "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [the sentencing statute]." 18 U.S.C. § 3553(a). These purposes include the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford adequate deterrence, and to protect the public from further crimes of the defendant. *See id.* § 3553(a)(2)(A)–(C). The statute also instructs the court to consider, among other things, the nature and circumstances of the offense and the history and characteristics of the defendant. *See id.* § 3553(a)(1). Of course, the court considers, as appropriate, all the factors and purposes set forth in 18 U.S.C. § 3553(a). The court also has considered all arguments of counsel, McNeill's statement at sentencing, and all evidence in the record.

As for the nature and circumstances of the offense, the offenses of conviction are very serious. Given McNeill's lengthy criminal history, he had no right to possess a firearm. Additionally, he possessed the firearm in connection with possessing crack cocaine. *See* PSR ¶ 5. Instead of heeding law enforcement's orders to stop, McNeill fled. *Id.* The instant offenses are just the latest examples of McNeill's disrespect for the law. The court imposes a sentence that recognizes the seriousness of McNeill's offenses and promotes respect for the law. Anything less than a

substantial period of incarceration for McNeill would promote disdain—rather than respect—for the law.

As for McNeill's history and characteristics, McNeill is thirty-three years old and has an astonishing and violent criminal record. *See* PSR ¶¶ 8-23. Moreover, his work history is nearly nonexistent. *See id.* ¶ 39. Admittedly, McNeill has spent much of his adult life incarcerated and has had few positive role models in his immediate family. He is unaware of his father's identity, and many of his known family members (including his mother) have criminal records. *Id.* if 32. Although these factors help to explain (in some respect) McNeill's conduct, these factors do not excuse his conduct.

The court imposes a sentence that provides just punishment. The court has taken McNeill' s apparent remorse into account in fashioning a sentence that imposes just punishment. However, McNeill's serious criminal conduct merits serious punishment. In addition, McNeill and others who would engage in similar conduct must be deterred. The court considers deterrence (both specific and general) to be critical in this case. A substantial period of incarceration is needed to deter McNeill from committing violent offenses and other felonies. Of course, a lengthy sentence also will provide the public protection from McNeill. In addition, the sentence will provide ample time for McNeill to receive substance abuse treatment, learn vocational skills, and receive mental health treatment.

The court concludes that it can impose a sentence within the advisory guideline range that meets the factors in 18 U.S.C. § 3553(a). Accordingly, after considering all the facts and circumstances of this case, the PSR, and all arguments and filings of counsel, the court sentences McNeill to the custody of the

Bureau of Prisons ("BOP") for a term of 300 months for count one and 240 months for count two (the statutory maximum). The court concludes that this is the sentence that is "sufficient, but not greater than necessary," to meet the purposes set forth by Congress. 18 U.S.C. § 3553(a).

Alternatively, having fully considered all section 3553(a) factors and for the reasons stated herein and in open court, the court notes that it would impose the same 300-month and 240-month sentences as variance sentences even if the court has incorrectly calculated the advisory guideline range or has erroneously departed. *See, e.g., United States v. Keene*, 470 F.3d 1347,1348-50 (11th Cir. 2006) (describing process of announcing post-*Booker* alternative sentence); *see also Williams v. United States*, 503 U.S. 193,204 (1992) ("A sentence thus can be 'reasonable' even if some of the reasons given by the district court to justify the departure from the presumptive guideline range are invalid, provided that the remaining reasons are sufficient to justify the magnitude of the departure."); *Evans*, 526 F.3d at 165 ("When, as here, a district court offers two or more independent rationales for its deviation, an appellate court cannot hold the sentence unreasonable if the appellate court finds fault with just one of these rationales. Picking through the district court's analysis in that manner would be wholly inconsistent with the Supreme Court's directives . . . ." (emphasis omitted)).

After fully considering the entire record in this case, the court orders that McNeill's federal sentence shall be served consecutive to his current state sentence. *See* 18 U.S.C. § 3584. Upon release from incarceration, McNeill shall be placed on supervised release for a period of five years. The court

announced all other details of the sentence in open court and also described McNeill's appellate rights, and will not recount them here.

Defense counsel has requested a thirty-six-day downward variance to account for the delay in sentencing because of Probation's request for additional time to prepare the PSR [D.E. 34]. Because the court is ordering McNeill's sentence to be served consecutive to his unexpired state sentence, the court denies his motion for a downward variance. In fashioning the sentence, the court considered all arguments of defendant, including the concern for unwarranted sentencing disparities and McNeill's age at the time of some of his predicate offenses. *See* Def.'s Mem. 2-4.

The court has imposed this sentence for the reasons discussed herein and the reasons discussed in open court, which are hereby incorporated by reference. This order is intended to provide a statement of reasons for defendant's sentence, should be read consistently with those reasons announced in open court, and does not alter or amend the court's judgment as announced in open court.

SO ORDERED. This 26 day of January 2009.

JAMES C. DEVER

JAMES C. DEVER III
United States District Judge

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed 03/08/2010]

No. 09-4083

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CLIFTON TERELLE MCNEILL,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
James C. Dever III, District Judge.
(5:08-cr-00002-D-1)

Argued: January 29, 2010
Decided: March 8, 2010

Before TRAXLER, *Chief Judge*, NIEMEYER,
Circuit Judge, and Jackson L. KISER,
Senior United States *District Judge* for the
Western District of Virginia,
sitting by designation.

Affirmed by published opinion. Chief Judge Traxler wrote the opinion, in which Judge Niemeyer and Judge Kiser joined.

COUNSEL

ARGUED: James Edward Todd, Jr., OFFICE OF THE FED-ERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Anne Margaret Hayes, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee. ON BRIEF: Thomas P. McNamara, Federal Public Defender, G. Alan DuBois, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. George E. B. Holding, United States Attorney, Jennifer P. May-Parker, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

OPINION

TRAXLER, *Chief Judge*:

Clifton Terelle McNeill appeals from the sentence imposed after he was convicted of unlawful possession of a firearm and unlawful possession with intent to distribute approximately 3.1 grams of crack cocaine. *See* 18 U.S.C.A. §§ 922(g)(1) (West 2000); 21 U.S.C.A. § 841(a)(1) (West 2000). We affirm.

I.

On February 28, 2007, Fayetteville, North Carolina police officers attempted to effect a routine traffic stop after observing a car driven by McNeill travel through a red light. McNeill evaded the police for several miles. He then made an abrupt stop and fled from his vehicle. An officer tackled McNeill and found a .38-caliber Smith & Wesson revolver lying on the ground underneath McNeill's body. A search of McNeill revealed 3.1 grams of crack cocaine, packaged for distribution, along with $369 in U.S. currency.

McNeill was subsequently indicted for unlawful possession of a firearm (Count One), 18 U.S.C.A. § 922(g)(1), possession with intent to distribute crack cocaine (Count Two), 21 U.S.C.A. § 841(a)(1), and possession of a firearm during and in relation to a drug trafficking crime (Count Three), 18 U.S.C.A. § 924(c)(1)(a)(i) (West 2000). McNeill pleaded guilty to Counts One and Two, and Count Three was dismissed at sentencing. The court determined McNeill to be an armed career criminal and then departed upward from the United States Sentencing Guidelines to sentence McNeill to 300 months' imprisonment on Count One and 240 months' imprisonment on Count Two, the maximum sentence applicable to McNeill under 21 U.S.C.A. § 841(b)(1)(C) (West 2000).

II.

McNeill first argues that the district court erred in sentencing him as an armed career criminal because only two of the previous offenses relied on by the district court in applying the enhancement qualify as predicate offenses under the Armed Career Criminal Act ("ACCA"), 18 U.S.C.A. § 924(e) (West 2000). "Whether [a prior] conviction qualifies as a predicate conviction under section 924(e) is a question of statutory interpretation [that we] review[ ] *de novo*." *United States v. Brandon*, 247 F.3d 186, 188 (4th Cir. 2001).

Because McNeill had been previously convicted of crimes carrying sentences of more than one year, his possession of a firearm violated 18 U.S.C.A. § 922(g)(1). The ACCA imposes a mandatory minimum sentence of 15 years for section 922(g) violations if the defendant has three previous convictions "for a violent felony or a serious drug offense." 18 U.S.C.A. § 924(e)(1). McNeill contends that he is not eligible for sentencing under the ACCA because the drug-

related convictions upon which the district court relied do not qualify as serious drug offenses under the ACCA.[1]

As is relevant here, the ACCA defines a serious drug offense as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C.A. § 924(e)(2)(A)(ii). The probation officer who prepared McNeill's presentence report identified McNeill's 1992 and 1995 convictions in North Carolina for selling cocaine and possession with intent to sell cocaine as predicates for the defendant's armed career criminal status. At the time McNeill committed these offenses, the crimes carried maximum sentences of ten years. *See* N.C. Gen. Stat. § 15A-1340.1, *et seq.* (repealed 1993); N.C. Gen. Stat. § 14-1.1 (repealed 1993). North Carolina subsequently revised its sentencing laws, and under the 1994 Structured Sentencing revisions, the crimes underlying McNeill's drug convictions now carry a maximum penalty of 25 months in prison. *See* N.C. Gen. Stat. § 15A-1340.17.

The district court held that the maximum sentence for a predicate conviction under the ACCA is determined as of the time of the underlying offense. McNeill, however, argues that the plain language of the statute makes clear that in order to qualify as a "serious drug offense," the state offense must carry a maximum penalty of at least ten years in prison at the time of the defendant's *federal* sentencing. As

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[1] McNeill does not dispute that he has two other qualifying convictions: one for assault with a deadly weapon and one for common law robbery.

quoted above, the ACCA defines "serious drug offense" as "an offense under State law . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C.A. § 924(e)(2)(A)(ii) (emphasis added). McNeill reasons that the statute's use of the present tense "is" reflects congressional intent to defer to a state's current judgment regarding whether it deems a particular drug offense serious.

In support of his view, McNeill points us to *United States v. Morton*, 17 F.3d 911 (6th Cir. 1994), in which the Sixth Circuit held that principles of lenity required the district court to determine whether the defendant's previous convictions were serious drug offenses at the time of the federal sentencing. *See id.* at 915. Because Tennessee did not consider the defendant's previous trafficking offenses serious enough to impose a ten-year sentence at the time of sentencing, the *Morton* court vacated the district court's sentence and remanded for resentencing. *See id.*

McNeill also relies on *United States v. Darden*, 539 F.3d 116, 121 (2d Cir. 2008). In *Darden*, the Second Circuit found that the maximum term prescribed by state law for an offense should be determined according to the law at the time of the federal sentencing for the simple reason that "the ACCA's definition of a 'serious drug offense' uses the present tense in referring to the applicable state law." *Id.* Additionally, the Second Circuit looked to the statute's purpose—"to defer to the sentencing policy of each state as the measure of the seriousness of the drug offense"—and decided it was "eminently reasonable for Congress to defer to the state lawmaker's *current* judgment rather than to the state lawmaker's discarded judgment." *Id.* at 122 (emphasis in original). Moreover, the Second

Circuit determined that the nonretroactivity of the sentencing reform had no bearing on whether an offense is a serious drug offense. It stated that "the decision whether to make a newly recognized legal right retroactive is normally a remedial decision that should not be confused with an assessment of the temporal scope of the legal right." *Id.* at 127 (citing *Danforth v. Minnesota*, 552 U.S. 264 (2008)) (emphasis in original). Accordingly, the court found that the "timing of the offense conduct is not part of the offense of conviction to which the maximum term is tied for purposes of the ACCA." *Id.*

The Fifth Circuit, however, reached a contrary conclusion in *United States v. Hinojosa*, 349 F.3d 200 (5th Cir. 2003). The *Hinojosa* court held that the defendant's three drug convictions that predated the effective date of the revisions to Texas's criminal code qualified as "serious drug offenses" under the ACCA. *See id.* at 205. The court noted that, unlike the Tennessee sentencing scheme at issue in *Morton*, Texas's revised scheme "specifically provides that the revised sentences do not apply to crimes committed before the effective date of the revisions." *Id.* The court concluded that "even under *Morton*, [the defendant's] previous convictions would be for 'serious drug offenses' because if he were sentenced by the state . . . today, he would still be subject to a maximum term of at least ten years." *Id.*

When North Carolina revised its sentencing scheme in 1994,. it specifically provided that the revised sentences would not apply to crimes committed before the effective date of the revisions. *See* N.C. Gen. Stat. § 15A-1340.10; *State v. Branch*, 518 S.E.2d 213, 215 (N.C. Ct. App. 1999) (explaining that the defendant's "offenses that were committed prior to 1

October 1994, the effective date of the Structured Sentencing Act, fall under the sentencing guidelines of the Fair Sentencing Act as a matter of law"). In effect, then, North Carolina has two sentencing schemes—one governing offenses committed before October 1, 1994, and another governing offenses committed after October 1, 1994. In this regard, North Carolina's revised sentencing scheme is similar to the Texas sentencing scheme at issue in *Hinojosa*, and we find the Fifth Circuit's reasoning in that case to be persuasive. Contrary to the interpretation of the Second Circuit in *Darden*, the date on which McNeill committed his crime is critical to the determination of his sentence under North Carolina law. If McNeill were tried and convicted today for his drug offenses committed in 1991, 1992, and September 1994,[2] he would be subject to the higher sentences imposed by the pre- October 1994 sentencing statutes. McNeill's previous felony drug convictions were punishable by a maximum term of imprisonment of at least ten years both at the time he commit-ted the offenses and at the time of his federal sentencing. Therefore, we conclude that McNeill was properly sentenced as an armed career criminal.

III.

McNeill also argues that the district court erred in finding that the criminal history category of VI substantially underrepresented the seriousness of his criminal history and likelihood of recidivism. He claims that the career offender and armed career criminal enhancements already encompassed the

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[2] North Carolina has no statute of limitations for felony offenses. *See State v. Johnson*, 167 S.E.2d 274, 279 (N.C. 1969).

recidivism and criminal history factors that guide an upward departure under U.S.S.G. § 4A1.3.

"[A]n appellate court must defer to the trial court and can reverse a sentence only if it is unreasonable, even if the sentence would not have been the choice of the appellate court." *United States v. Evans*, 526 F.3d 155, 160 (4th Cir. 2008) (emphasis omitted) (citing *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); and *Rita v. United States*, 551 U.S. 338 (2007)). When reviewing a departure, we consider "whether the sentencing court acted reasonably both with respect to its decision to impose such a sentence and with respect to the extent of the divergence from the sentencing range." *United States v. Hernandez-Villanueva*, 473 F.3d 118, 123 (4th Cir. 2007).

A district court may depart upward based on the inadequacy of the defendant's criminal history if "reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1 .3(a)(1). Contrary to McNeill's argument that an upward departure is contemplated only where armed career criminals have a criminal history category IV or V, it is clear that the guidelines anticipated that an upward departure might apply in the case of an armed career criminal and that an upward departure might occur where a defendant's criminal history falls within category VI. *See* U.S.S.G. § 4B1.4 cmt. background; U.S.S.G. § 4A1.3(a)(4)(B).

Here, the court emphasized McNeill's extensive criminal past, including convictions for 21 criminal offenses. The court also pointed out that McNeill had

multiple unscored offenses and that McNeill's crimes were becoming increasingly more violent. Furthermore, the court considered that while incarcerated and on parole, McNeill continued to engage in inappropriate and illegal conduct, including the possession of an illegal substance during his current state sentence. The court determined that the North Carolina criminal justice system had previously failed to stop McNeill and that an upward departure was necessary to deter McNeill from future offenses. Accordingly, the court's decision to depart was not procedurally or substantively unreasonable.

In addition, the extent of the departure was reasonable. A court that elects to upwardly depart under section 4A1.3 must move horizontally across successive criminal history categories up to category VI, and, if category VI is inadequate, the court must then vertically traverse to successively higher offense levels until it finds a guideline range appropriate to the case. *See* U.S.S.G. § 4A1.3(a)(4); *United States v. Dalton*, 477 F.3d 195, 200 (4th Cir. 2007). The district court considered offense levels 32 and 33 and found that they did not adequately reflect the seriousness of McNeill's criminal history or what the court viewed as the near certain likelihood that McNeill will commit other crimes, including violent crimes. Accordingly, the court found offense level 34 yielded the guideline range most appropriate in this case. Under these circumstances, we do not find the court abused its discretion in departing upward.

IV.

Finally, McNeill contends the district court erred by failing to explain its rejection of the mitigating factors from McNeill's childhood and adolescence in the court's sentencing determination.

To be sure, a "'sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority" by articulating how the sentencing factors apply to the case before it. *United States v. Carter*, 564 F.3d 325, 328 (4th Cir. 2009) (quoting *Rita*, 551 U.S. at 356). However, an appellate court "should [give] due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justif[y] the sentence." *Evans*, 526 F.3d at 162 (quoting *Gall*, 552 U.S. at 59-60).

Here, the court thoroughly considered whether a sentence within the advisory guideline range of 262 to 327 months' imprisonment would serve the factors set forth in § 3553(a). The court recognized that McNeill's latest offenses were very serious. McNeill was in illegal possession of a firearm in connection with his possession of crack cocaine when he fled from police officers. Additionally, the court took into account McNeill's history and characteristics. The court considered McNeill's young age in comparison to his extensive and violent criminal record. It noted that McNeill's work history was almost nonexistent as he spent much of his adult life incarcerated. Also, the court acknowledged McNeill's lack of positive role models or familial network, and his family members' criminal histories. The district court also stated that it had considered all of the arguments of defense counsel, the defendant's own statement, the presentence report, and all of the evidence on the record. Finally, the court concluded that a substantial period of incarceration was required to deter McNeill from committing violent and other felonies and provide public protection from McNeill, but that it would also provide time for McNeill to receive substance abuse

treatment, learn vocational skills, and receive mental health treatment.

The district court thoughtfully and thoroughly applied the prescribed sentencing factors to the facts of the case and "adequately explain[ed] the chosen sentence." *Gall*, 552 U.S. at 50. Therefore, we conclude the chosen sentence was reason-able.

V.

Accordingly, for the foregoing reasons, we hereby affirm McNeill's sentence.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed April 5, 2010]

No. 09-4083
(5:08-cr-00002-D-1)

UNITED STATES OF AMERICA,
Plaintiff – Appellee

v.

CLIFTON TERELLE MCNEILL,
Defendant – Appellant

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: *Chief Judge* Traxler, *Judge* Niemeyer *and Senior District Judge Kiser.*

For the Court

/s/ Patricia S. Connor, Clerk

PETITIONER'S BRIEF

No. 10-5258

Supreme Court, U.S.
FILED
FEB 25 2011
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IN THE

Supreme Court of the United States

CLIFTON TERELLE MCNEILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PETITIONER CLIFTON TERELLE MCNEILL

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QUESTION PRESENTED

The Armed Career Criminal Act (ACCA) applies to a person who "violates section 922(g)" and "has three previous convictions . . . for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(l). A "serious drug offense" is defined in relevant part as "an offense under State law . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." § 924(e)(2)(A)(ii). The Fourth Circuit Court of Appeals affirmed the district court's classification of Petitioner's prior North Carolina drug convictions as "serious drug offenses" under ACCA, even though at the time of Petitioner's federal sentencing, those offenses carried less than ten years' imprisonment under North Carolina law. The Fourth Circuit held that because Petitioner's crimes had been punishable by ten years in prison at the time he sustained his state convictions, and because North Carolina did not apply its current lesser terms retroactively, Petitioner's convictions qualified as "serious drug offenses" under ACCA.

The question presented is: Whether the plain meaning of the phrase "is prescribed by law" in the ACCA definition of a "serious drug offense" requires a federal sentencing court to look to the maximum penalty prescribed by state law at the time of the federal sentencing, regardless of whether the state has made the law retroactive.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence is reported at 598 F.3d 161. (J.A. 126).

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence was issued on March 8, 2010. (J.A. 126). On March 22, 2010, Petitioner submitted a request for rehearing and rehearing en banc which the Fourth Circuit Court of Appeals denied on April 5, 2010. (J.A. 137). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Armed Career Criminal Act's sentencing penalties apply "[i]n the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense . . . ." 18 U.S.C. § 924(e)(1).

ACCA defines a "serious drug offense" in pertinent part as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." § 924(e)(2)(A)(ii).

STATEMENT OF THE CASE

A. Petitioner's Offense, Conviction, Sentencing, And Appeal.

On February 28, 2007, police in Fayetteville, North Carolina, arrested the Petitioner, Clifton Terelle McNeill, following a traffic stop. (J.A. 46). During a search incident to that arrest, the officers found a firearm and 3.1 grams of cocaine base in Petitioner's possession. (J.A. 46).

On January 2, 2008, a federal grand jury sitting in the Eastern District of North Carolina returned a three-count indictment that charged Petitioner with unlawful possession of a firearm by a felon, 18 U.S.C. § 922(g)(1), (Count I); possession with intent to distribute a quantity of cocaine base, 21 U.S.C. § 841(a)(1), (Count II); and possession of a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c), (Count III). (J.A. 13, 27-28). On August 18, 2008, Petitioner pleaded guilty to Counts I and II, pursuant to a plea agreement that called for the dismissal of Count III at the time of sentencing. (J.A. 18, 31-40, 42, 80-81).

On January 13, 2009, the district court sentenced Petitioner to imprisonment for concurrent terms of 300 months on Count I, the felon-in-possession count, and 240 months on Count II. (J.A. 80-82). The sentence for Count I reflected both a designation of Petitioner as an armed career criminal under 18 U.S.C. § 924(e) and an upward departure above the sentencing guideline imprisonment range of 188 to 235 months. (J.A. 95-96, 98-100, 104, 118-125).

The district court found that Petitioner qualified for the Armed Career Criminal Act enhancement based on two 1995 convictions in North Carolina state court

for common law robbery and felony assault, and six North Carolina convictions Petitioner sustained between 1992 and 1995 for sale of cocaine and possession of cocaine for sale. (J.A. 47-53, 117-18). Petitioner conceded that his robbery and assault convictions qualified as ACCA predicates because they were "violent felonies," but he disputed that any of his drug convictions qualified as "serious drug offenses." (J.A. 71-72). With respect to the latter, Petitioner said that while his drug crimes had carried a maximum imprisonment term of at least ten years when he committed them, North Carolina had lowered its drug penalties by the time of his federal sentencing. (J.A. 71-72). Petitioner maintained that because of the change in the law, his violations did not qualify as "serious drug offenses" because they no longer carried ten-year penalties. (J.A. 71-72, 75-76). On this basis, Petitioner argued he had only two predicate convictions—the violent felonies—for purposes of the ACCA sentencing enhancement. (J.A. 71-72, 75-76, 117-18). Over-ruling Petitioner's objection, the district court said that "[u]nder the ACCA, a court looks to the maximum sentences for the offenses at issue at the time of the [prior] offense." (J.A. 118).

On January 13, 2009, Petitioner timely appealed his sentence to the United States Court of Appeals for the Fourth Circuit. (J.A. 106-07). On appeal, Petitioner repeated his claim that his North Carolina drug convictions were not "serious drug offenses" because at the time of his federal sentencing the offenses were no longer punishable by a term of at least ten years in prison.[1] (J.A. 128-32). Noting that

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1 Petitioner also challenged the procedural and substantive reasonableness of the district court's upward departure, a

ACCA defines a serious drug offense as one for which a ten-year imprisonment term "is prescribed by law," Petitioner argued the plain meaning of the phrase required a court to measure seriousness by the maximum penalty presently in effect and not by any term that might have applied at the time of the state conviction. (J.A. 129-30).

In support of his argument, Petitioner cited the Second and Sixth Circuit decisions in *United States* v. *Darden*, 539 F.3d 116 (2d Cir. 2008), and *United States* v. *Morton*, 17 F.3d 911 (6th Cir. 1994). (J.A. 130). In those cases, the circuit courts said that ACCA defines a serious drug offense by means of the maximum term of imprisonment that is in place at the time of the federal sentencing. *Darden*, 539 F.3d at 122, 127; *Morton*, 17 F.3d at 915. Both circuits also concluded that the rule of lenity required that any doubt about the maximum sentence that "is prescribed by law" be resolved in favor of looking at a state's current penalties. *Darden*, 539 F.3d at 128; *Morton*, 17 F.3d at 915.

The Court of Appeals rejected Petitioner's argument and declined to follow *Darden* and *Morton*. (J.A. 131-32). Instead, the Fourth Circuit adopted the position of the United States Court of Appeals for the Fifth Circuit. *Id.* (citing *United States* v. *Hinojosa*, 349 F.3d 200 (5th Cir. 2003)). Consistent with *Hinojosa*, the Fourth Circuit reasoned that because North Carolina had not made its current sentencing law retroactive, and because the state recognizes no statute of limitations for felony offenses, "[i]f [Petitioner] were tried and convicted today for his drug offenses committed in 1991, 1992, and

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challenge the Fourth Circuit rejected. (J.A. 132-36). Petitioner does not seek review of that issue.

September 1994, he would be subject to the higher sentences imposed by the pre-October 1994 sentencing statutes." (J.A. 132). The Fourth Circuit therefore concluded Petitioner "was properly sentenced as an armed career criminal," because his "previous felony drug convictions were punishable by a maximum term of imprisonment of at least ten years both at the time he committed the offenses and at the time of his federal sentencing." *Id.*

On March 22, 2010, Petitioner filed a petition for rehearing and for rehearing *en banc*. (J.A. 8). The Fourth Circuit denied the rehearing petition on April 5, 2010. (J.A. 137).

B. On October 1, 1994, North Carolina Enacted Structured Sentencing As A "Truth In Sentencing" Reform, Lowering, In The Process, The Statutory Maximums For Petitioner's Prior Drug Offenses To Below Ten Years.

The central argument in the district court and in the Court of Appeals turned on a 1994 change in North Carolina's sentencing laws that substantially lowered maximum penalties for certain drug offenses. Beginning in the late 1980s, North Carolina confronted a crisis within its criminal justice system precipitated by prison overcrowding, threats of a federal takeover, and insufficient resources. In response, the state legislature re-instated discretionary parole, and the parole commission began "releasing inmates at an unprecedented rate." *The North Carolina Sentencing and Policy Advisory Commission: A History of Structured Sentencing*, at 2

(Aug. 2009) (*Commission Report*).[2] Combined with a generous day-for-day good-time credit, defendants "were serving only a fraction of the time that they received in court." *Id.* at 2-3. Since the existing statutes permitted wide judicial discretion, "judges imposed even longer sentences and defendants, counting on early release, refused probation and elected to serve an active sentence." *Id.* This fact further exacerbated over-crowding and increased the risk that the federal government would take control of the state prisons. *Id.* at 2-4.

In response to these problems, the state legislature created the North Carolina Sentencing and Policy Commission (Commission), to design and implement "truth in sentencing" reform. *Id.* at 8-9; N.C. Gen. Stat. § 164-35. The Commission's enabling legislation required it to "classify criminal offenses . . . on the basis of their severity," and "recommend structures for use by a sentencing court in determining the most appropriate sentence to be imposed in a criminal case." §§ 164-41(a), 164-42(a). To comply with this mandate, the Commission proposed legislation that established a grid with nine classes of felony offenses, ranked by severity of offense, and six recidivism levels called the "prior record levels." See §§ 15A-1340.12, 1340.14, 1340.17. The sentencing grid contained both minimum and maximum terms of imprisonment prescribed for a particular offense classification and prior record level. §§ 15A-1340.17(c)-(d); *Commission Report*, at 17-20.

Structured Sentencing set prior record levels on the basis of the severity of a defendant's past offenses.

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2 *available at* http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/commission_history_aug2009.pdf (last accessed Feb. 9, 2011).

See § 15A-1340.14(c); *Commission Report*, at 13 ("The more serious the prior conviction, the higher the points assigned to the defendant."). It did not, however, affect offense definitions. The new law also eliminated the existing statutory maximums for lower level offenses such as the ones committed by Petitioner. Compare N.C. Gen. Stat. §§ 90-95(a)(1),-95(b)(1) (Michie 1993), with §§ 90-95(a)(1),-95(b)(1) (West 2008); see also §§ 14-1.1(7)-(8) (Michie 1993). For those offenses, Structured Sentencing eliminated the ten-year maximum term of imprisonment applicable under the old sentencing law, § 14-1.1(8) (Michie 1993), and instead prescribed thirty months as the highest possible sentence for Petitioner's class of offenses, the Class H felony. See §§ 90-95(a)-(b); 15A-1340.17(c)-(d).[3]

Like the old sentencing law which it replaced, Structured Sentencing contained a savings clause.

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3 Subsequent to the enactment of Structured Sentencing, North Carolina changed the classification for the offense of sale of a controlled substance from a Class H to a Class G felony. *See State* v. *Watkins*, 672 S.E.2d 43 (N.C. Ct. App. 2009) (noting that change in classification occurred after 1997 and prior to 2007). Since four of Petitioner's six drug offenses were for sale of cocaine, (J.A. 47-9), those offenses are Class G offenses under current North Carolina law. N.C. Gen Stat. §§ 90-95(a)(1),-95(b)(1)(i). This re-classification is not pertinent to Petitioner's argument, because Structured Sentencing reduced the statutory maximum term of fifteen years for Class G offenses to below ten years. *Compare*, § 14-1.1(7) (Michie 1993) (maximum term of imprisonment for Class G offense is fifteen years), *with* §§ 15A-1340.17(c)-(d) (West 2008) (setting thirty-one months as highest minimum imprisonment term and thirty-eight months as highest corresponding maximum term for a Class G offense). Since the classification as G or H does not affect the issue presented, hereinafter Petitioner will refer to all six offenses as "drug offenses."

See N.C. Gen. Stat. §§ 15A-1340.10; 14-1.1 (Michie 1993). Thus, for purposes of prosecutions and sentencing, the new law applied only to offenses committed on or after the statute's effective date, October 1, 1994. § 15A-1340.10.

Although the savings clause made Structured Sentencing non-retroactive, the new law did have a bearing on offenses committed prior to October 1, 1994. For purposes of setting a defendant's prior record level, the recidivism-based penalties based on the seriousness of a defendant's past offenses, Structured Sentencing mandated looking to the *current* punishment prescribed for those offenses. See § 15A-1340.14(c). Accordingly, if Petitioner's prior record level were being set today in a North Carolina state court, the court would determine the severity of his 1990s drug offenses on the basis of their current statutory maximum penalties, not on the ten-year terms that applied at the time of Petitioner's convictions.

SUMMARY OF ARGUMENT

I. The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides an enhanced penalty for individuals who, inter alia, have three prior convictions for a "serious drug offense." The statute defines the term as "an offense under State law . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." § 924(e)(2)(A)(ii). To determine whether the defendant has committed a serious drug offense, ACCA requires a district court to look to the penalty that is currently prescribed for that offense and not to any earlier version of the law.

A. ACCA, by its plain language, measures seriousness in terms of the present status of an offense. Congress, using the present tense, directed

courts to look to the penalty that "is prescribed" for a crime, not to one that "was prescribed." The language of the statute thus demonstrates that it is the present punishment for a drug offense that determines the seriousness of that crime. Moreover, reading the statute in this way is consistent with ACCA's purpose to defer to the states' assessment of the seriousness of offenses within their jurisdictions. *United States* v. *Rodriquez*, 553 U.S. 377, 388 (2008).

B. The Fourth Circuit erroneously believed it could look to the penalties that applied at the time Petitioner committed his drug offenses because North Carolina did not make its current sentencing statute retroactive. The Fourth Circuit's approach reflects its misapprehension of what "an offense" is for ACCA purposes. *Rodriquez* teaches that the individual circumstances surrounding a crime, such as the date the defendant committed it, form no part of the offense itself. Additionally, when an offense date does determine the statutory maximum a defendant faces, it is not a penalty prescribed "for" the offense. The higher penalty has to do with the question of retroactivity and does not mean the date of commission has made the offense more serious.

II. The Fourth Circuit erroneously read North Carolina's decision to make its sentencing scheme non-retroactive as an affirmative declaration by the state that older offenses were more serious than newer ones. In truth, the state's retroactivity decision had nothing to do with the question of offense severity. Rather, North Carolina had administrative reasons for choosing to make its new law prospective only.

A. The Fourth Circuit mistakenly assumed that a state's retroactivity decision could ever include a normative judgment about the seriousness of an

offense. This mistaken assumption overlooked the fact that North Carolina used non-retroactivity merely as a savings clause to preserve existing prosecutions and avoid the abatement doctrine. See *United States* v. *Tynen*, 78 U.S. 88 (1871) (explaining common law of abatement); see also Comment, *Today's Law And Yesterday's Crime: Retroactive Application of Ameliorative Legislation*, 121 U. Pa. L. Rev. 120, 127-28 (1972).

Finally, retroactive application of Structured Sentencing would have raised ex post facto challenges, because the new law eliminated generous early-release provisions and established minimum imprisonment terms for offenses where such terms had not formerly existed.

B. The evidence shows that North Carolina had several administrative and budgetary reasons for determining that Structured Sentencing would only have prospective effect. The state needed to ensure adequate funding to implement the near-total revision of its sentencing laws and policies. As a "truth in sentencing" statute, moreover, the state expected that prisoners effectively would serve the same amount of time that they had served under the old law. The state had no need or impetus to make the new law retroactive.

C. Structured Sentencing's treatment of past offenses for purposes of establishing a "prior record level" is the clearest illustration that North Carolina's retroactivity decision did not say anything about offense seriousness. To set the prior record level under Structured Sentencing, a defendant's prior convictions are given point values based on the seriousness of those offenses. N.C. Gen. Stat. §§ 15A-1340.14, 15A-1340.17; see *Commission Report*, at 13. In assigning points, courts must use the current law's

offense classifications, regardless of whether a defendant committed the offense before or after the effective date. See § 15A-1340.14(c); see also *Watkins*, 672 S.E.2d at 52-53. Contrary to the Fourth Circuit's treatment of Petitioner's prior offenses, North Carolina gauges the seriousness of an offense on the basis of its present status. North Carolina's practice is consistent with ACCA's punishment of the instant offense and not of the defendant's past crimes. See *Rodriquez*, 553 U.S. at 385-86.

III. Petitioner reads § 924(e) as requiring a court to look at the current maximum sentence for an offense in order to determine the penalty that "is prescribed" for that offense. The Fourth Circuit, on the other hand, reads ACCA as requiring an additional inquiry into when the prior convictions occurred. The Fourth Circuit's approach raises three serious problems.

First, the Fourth Circuit's rule will result in the disparate imposition of ACCA's severe penalties. Two defendants may have the same offenses in their criminal history but may receive radically different federal sentences based only on the dates of the prior offenses.

Second, because the Fourth Circuit's reading of ACCA differentiates defendants with identical criminal histories, equal protection problems arise. See, *e.g.*, *Clements* v. *Fashing*, 457 U.S. 957, 967 (1982) ("[T]hose classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution."). Additionally, the Sixth Amendment is implicated when a court enhances a defendant's sentence based on a fact about a prior conviction. See *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). In contrast, Petitioner's construction of ACCA raises no such constitutional questions.

Moreover, if the Fourth Circuit's reading of § 924(e) is adopted by this Court, the rule will prove difficult, if not impossible, to apply consistently. Statutes of limitations, for example, may make problematic a determination of the sentence a defendant faced for an offense. Moreover, in states such as Delaware where a defendant may choose between the old and new sentencing laws, the Fourth Circuit's approach potentially treats a prior offense as serious and not serious at the same time. See, *e.g.*, Del. Code Ann. tit. 11, § 4216(d). Taking the "prescribed" penalty for an offense from the law in effect at the time of the federal sentencing produces none of these potential difficulties in application.

ARGUMENT

I. THE PLAIN MEANING OF THE ARMED CAREER CRIMINAL STATUTE REQUIRES A FEDERAL SENTENCING COURT TO LOOK AT THE MAXIMUM PENALTY PRESCRIBED BY CURRENT STATE LAW TO DETERMINE WHETHER THE OFFENSE IS A "SERIOUS DRUG OFFENSE."

The Armed Career Criminal Act provides for enhanced punishment, including a mandatory minimum sentence of fifteen years, for felons who unlawfully possess a firearm after sustaining three convictions for either a violent felony or "serious drug offense." 18 U.S.C. § 924(e). ACCA defines a "serious drug offense" as "an offense under State law . . . for which a maximum term of imprisonment of ten years of more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii).

The statute's specification of "an offense" shows that the crime is to be viewed in its generic sense,

without regard to the date of its commission. Equally, § 924(e)'s use of the present tense to describe the maximum term of imprisonment—as a penalty that "is prescribed by law"—demonstrates that it is the state's current statutory maximum that is the proper measure of offense seriousness. To determine whether a particular state conviction constitutes a "serious drug offense" within the meaning of ACCA, therefore, a federal sentencing court must look to the penalty presently in effect for that offense. The "serious drug offense" inquiry is a narrow and straightforward one: the court identifies the offense of conviction and looks to whether, under current state law, the maximum imprisonment term is ten years or more.

A. Congress' Use Of The Present Tense Demonstrates That "A Serious Drug Offense" Is Defined By Reference To The State Law In Effect At The Time Of The Federal Sentencing.

As well-articulated by the Second Circuit, the issue presented in this case is "whether a prior state conviction [is] a conviction for a 'serious drug offense' within the meaning of the ACCA, where state law prescribed a maximum sentence of at least ten years for the offense at the time of the state conviction but state law, prior to federal sentencing, prospectively reduced the maximum sentence to less than ten years for the same offense conduct." *Darden*, 539 F.3d at 124. The answer to this question requires a court to decide whether to apply a state's current sentencing laws or the laws in effect at the time the defendant sustained his state convictions.

ACCA's definition of a "serious drug offense" is written in the present tense. The statute's plain language thus establishes that it is a state's current penalty structure that determines seriousness. *United States* v. *Wilson*, 503 U.S. 329, 333 (1992) (emphasizing, "Congress' use of a verb tense is significant in construing statutes"); *Carr* v. *United States*, 130 S. Ct. 2229, 2236, (2010) ("[W]e have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach."); *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 117 (1983) (noting, "Congress carefully distinguished between present status and a past event" by use of the present and present perfect tenses in § 922) (*superseded in part by* 18 U.S.C. § 921(a)(20)). Indeed, each court that has addressed the "is prescribed by law" language of § 924(e) has concluded that the statute speaks of the imprisonment term that an offense presently carries. See *Darden*, 539 F.3d at 121; *Morton*, 17 F.3d at 915; *United States* v. *Hinojosa*, 349 F.3d 200, 205 (5th Cir. 2003).

In defining a "serious" offense by reference to the applicable imprisonment term, Congress could have referred to the punishment that "is or was prescribed" for the crime; it chose not to do so. See *Barrett* v. *United States*, 423 U.S. 212, 216-17 (1976) (emphasizing, "Congress knew the significance and meaning of the language it employed" in § 922). The statute's use of the phrase "is prescribed" limits the "serious drug offense" inquiry to a state's current sentencing law. See *Burgess* v. *United States*, 553 U.S. 124, 130 (2008) ("As a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated.") (internal quotation marks and citation omitted). The fact that a state conviction may have, at some point prior to the

defendant's federal sentencing, satisfied the definition of a "serious drug offense" is irrelevant. Congress' use of the present tense signals that it is the present status of a drug offense that determines whether or not it is "serious." *Carr*, 130 S. Ct. at 2237; (recognizing that "a statute's undeviating use of the present tense [is] a striking indic[ator] of its prospective orientation") (internal quotations and citation omitted) (second alteration in original).

ACCA's underlying purpose reinforces this plain reading of its statutory language. Section 924(e) defers to "state law as the measure of the seriousness of state offenses." *Rodriquez*, 553 U.S. at 388. By looking to state penalties, "Congress presumably thought—not without reason—that if state lawmakers provide that a crime is punishable by 10 years' imprisonment, the lawmakers must regard the crime as 'serious,' and Congress chose to defer to state lawmakers' judgment." *Id.* In *Darden*, the Second Circuit noted that "[i]n light of this statutory purpose," it was eminently reasonable for Congress to defer to the state lawmaker's *current* judgment rather than to the state lawmaker's discarded judgment." 539 F.3d at 122. "Thus," the court of appeals said, "a consideration of the statutory purpose confirms our plain reading of the statute's text: judges should examine the state law in place at the time of the federal sentencing." *Id.*

B. Regardless Of Whether The Current State Law Applies Retroactively To The Date The Defendant Committed The State Offense, The Current Law Determines Whether That Offense Is "Serious" Under ACCA.

Because a federal sentencing court must look to current state law in order to determine whether a

state offense qualifies as an ACCA predicate, it is a simple matter for the court to determine whether the state offense under consideration carries a maximum penalty of at least ten years in prison. In the instant case, for example, Petitioner's six convictions are for drug offenses that, under North Carolina's statutory scheme, are "Class H" or "Class G" felonies. N.C. Gen. Stat. §§ 90-95(a)(1), (b)(1). At the time of Petitioner's 2009 federal sentencing, North Carolina law prescribed maximum penalties of less than ten years for these offense classes. § 15A-1340.17. Clearly, then, under the state's current penalty structure, none of Petitioner's drug crimes meets the ACCA definition of a "serious drug offense."

The Fourth and Fifth Circuits, however, have taken the inquiry one step further, to conclude that when a state's law is not retroactive, the federal court must look to the penalties in effect at the time the defendant committed his state offenses. See (J.A. 131-32) (Notwithstanding the lowered penalties prescribed by current North Carolina law, were Petitioner to be sentenced for his offenses today, "he would still be subject to a maximum term of at least ten years" by operation of the old law) (quoting *Hinojosa*, 349 F.3d at 205). By contrast, the Second and Sixth Circuits have determined that a state's retroactivity decision says nothing about its view of offense seriousness because it is the penalty provided in the current law that expresses that view. See *Morton*, 17 F.3d at 915; *Darden* 539 F.3d at 127-28.

The choice between these two competing interpretations turns in part on the question of whether the date of the commission of the crime is properly regarded as part of the "offense . . . for which" the maximum term is prescribed by law and is thus relevant to a determination of offense

seriousness. The answer to this question is found in this Court's recent decision in *Rodriquez* regarding the meaning of "an offense" and by ACCA's clear intent that federal courts defer to state judgments regarding the seriousness of state offenses.

Rodriquez established that "an offense" for purposes of § 924(e) is a crime in its generic form, without regard to the particular circumstances of its time or manner of commission. In short, "an offense" simply means "a violation of" state law. 553 U.S. at 383.[4] *Rodriquez*, in fact, emphasized that ACCA's "serious drug offense" definition focuses on "'the maximum term of imprisonment' prescribed for an 'offense,'" and not on "the circumstances of the particular [defendant] . . . ." *Id.* at 393 (citing *United States* v. *R.L.C.*, 503 U.S. 291, 295-96 (1992)). Contrasting ACCA with a sentencing provision for juveniles at issue in *R.L.C.*, *Rodriquez* reinforced the importance of looking at the ACCA determination of "an offense" as defined and punished by state law, rather than considering other factors that neither define nor comprise that offense. *Id.* at 392-93. Discussing the relevance of the juvenile statute at issue in *R.L.C.*, the *Rodriquez* Court said that "[b]ecause this provision focuses on the circumstances of the particular juvenile and not on the offense . . . it is not analogous to the ACCA provision that is before us in this case." *Id.* at 393.

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4 This Court's definition of "an offense" as a "violation of" state law comports with the definition of a "serious drug offense" contained in ACCA's legislative history. *See* H.R. Rep. No. 99-849, at 3 (1986) (referencing the addition of "serious drug offenses" as, "State and Federal Laws for which a maximum term of imprisonment of 10 years or more is prescribed").

Under *Rodriquez*, therefore, an ACCA analysis must look at "an offense" as it is defined by state law, without incorporating extraneous facts that do not bear on that definition. In Petitioner's case, sale of cocaine as defined by N.C. Gen. Stat. § 90-95(a)(1) constitutes a single offense, indivisible by time or circumstance.[5] Given the plain language of § 924(e)(2)(A)(ii), it is this statutory entity, and not Petitioner's particular violation of law, which constitutes the "offense" for purposes of the ACCA inquiry.

Viewed in terms of its statutory definition, sale of cocaine in North Carolina is the same offense today that it was when Petitioner sustained his convictions in the 1990s. The state law defining the offenses at issue did not change in the interval between Petitioner's state convictions and his federal sentencing. See *Darden*, 539 F.3d at 124 (noting, "the New York statutes defining the offense conduct, and setting out the felony classifications, have not been meaningfully amended since the state convictions"); compare N.C. Gen. Stat. §§ 90-95(a)(1), -95(b)(1) (Michie 1993), with §§ 90-95(a)(1), -95(b)(1) (West 2008). Thus, a defendant who sells cocaine in North Carolina today violates the same statute and (more significantly) commits the exact same *offense* that Petitioner committed.

The Fourth Circuit's error in this case resulted from its assumption that an offense's date of commission is a component of the offense itself. This is incorrect. See *United States* v. *Stuckey*, 220 F.3d

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5 The *only* elements of the offense of sale of cocaine are "(1) the sale or delivery of (2) a controlled substance (cocaine)." *State* v. *Neal*, 674 S.E.2d 713, 716 (N.C. Ct. App. 2009) (citing N.C. Gen. Stat. § 90-95(a)(1)).

976, 982 (8th Cir. 2000) ("Time is not a material element of a criminal offense unless made so by the statute creating the offense.") (citing *Ledbetter* v. *United States*, 170 U.S. 606, 612 (1898)). Because the date an offense occurred is not part of the violation of law comprising the offense, it does not inform the seriousness of the offense conduct. See *Darden*, 539 F.3d at 126 (reasoning that "the timing of the offense conduct" does not make a drug crime "more or less serious"). It is, therefore, a misapplication of *Rodriquez* to incorporate the date of commission into the definition of "an offense" when considering whether a particular conviction qualifies as an ACCA predicate.

Because the date it is committed does not make up a part of "an offense," when the commission date does expose the defendant to a higher statutory maximum (due to the non-retroactivity of current state law), it cannot be said, consistent with *Rodriquez*, that this higher penalty is prescribed *for* the "offense." See *Darden*, 539 F.3d at 125-26. A defendant may be subject to a higher statutory maximum solely because of offense timing, but if this penalty does not represent a normative judgment on the part of the state that earlier violations of the statute are more serious than current violations, it contravenes both the plain language of ACCA and the statute's underlying purpose to ignore the state's estimation of an offense's seriousness. In the words of the Second Circuit, "If a state determines that a drug-trafficking offense merits less than ten years' maximum imprisonment, but permits the imposition of a higher maximum sentence in an individual case for technical reasons that have no bearing on the state's current view of the seriousness of the offense, it would frustrate the purpose of the ACCA to conclude that

the drug-trafficking offense is a serious one." *Darden*, 539 F.3d at 126; see also *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve.").

For this reason, the Fourth Circuit's focus on an offense's date of commission is misguided. As the Second and Sixth Circuits have correctly held, both ACCA's purpose and its plain language focus on the current penalties provided by state law for the generic offense. Under a proper interpretation of § 924(e)(2)(A)(ii), a federal sentencing court need only identify the offense of conviction and determine whether current state law prescribes a penalty of ten years or more. The Fourth Circuit erred by broadening this narrow inquiry to include questions of retroactivity.

II. THE FOURTH CIRCUIT ERRONEOUSLY ASSUMED THE NON-RETROACTIVITY OF NORTH CAROLINA'S STRUCTURED SENTENCING LAW MEANT NORTH CAROLINA VIEWED AN OFFENSE COMMITTED BEFORE THE LAW'S EFFECTIVE DATE AS MORE SERIOUS THAN THE SAME OFFENSE COMMITTED AFTER THAT DATE.

The central assumption the Fourth Circuit made in this case is that North Carolina's decision not to apply its current sentencing law retroactively reflected a conscious judgment by state lawmakers that older violations of the state's drug laws were more serious than newer violations of it. The assumption is necessary to the conclusion the Court of Appeals reached, because, under ACCA, only states have the authority to delineate levels of seriousness

among state offenses. A federal sentencing court has no such power. Thus, if the Fourth Circuit's assumption about the meaning of the retroactivity decision is incorrect—if North Carolina did not use retroactivity to draw a normative distinction between old and new offenses—there is no basis for a federal court to hold that North Carolina drug offenses committed before Structured Sentencing qualify as ACCA predicates while those that followed its enactment do not. In fact, as shown below, the Fourth Circuit's conclusion that North Carolina's retroactivity determination reflected a normative judgment is not correct.

First, the Fourth Circuit mistakenly assumed that a state's retroactivity decision could ever incorporate a normative judgment about the seriousness of an offense. The fact is that the prospective effect of a new law represents the default legislative practice at both the federal and state levels. Moreover, a state's retroactivity determination involves a decision about remedy; it does not negate the state's substantive judgment contained in the new law. Finally, the Fourth Circuit did not consider that retroactive application of Structured Sentencing would have very likely violated the *Ex Post Facto* Clause because it eliminated the old law's generous parole and gain-time provisions and imposed mandatory minimum imprisonment terms where none had existed before.

Second, even if a state could make a normative judgment through a retroactivity decision, the evidence shows that North Carolina did not do so here. Rather, its decision to apply Structured Sentencing prospectively derived from administrative concerns. Chief among these was the state's need to ensure sufficient resources for the overhaul of its criminal sentencing system.

Third, and most importantly, Structured Sentencing's recidivism provisions demonstrate that North Carolina's current law determines the seriousness of a prior offense, irrespective of when the defendant committed that offense. The Fourth Circuit's erroneous imputation of a normative dimension into North Carolina's retroactivity decision creates gradations of seriousness among state offenses that North Carolina does not recognize and would not endorse. In Petitioner's case, therefore, the Fourth Circuit overlooked the state's unified view of offense seriousness.

A. A State's Decision Whether To Make A Sentencing Law Retroactive Is Wholly Unrelated To The State's View Of The Seriousness Of The Offense.

Properly understood, retroactivity determinations are remedial decisions that do not bring with them a state's judgment about the seriousness of particular offenses. Thus, in a very real sense, to even ask whether a state intended its retroactivity decision to draw distinctions between the seriousness of old and new offenses is to ask a meaningless question. "Seriousness" is simply not a concern when a state makes a retroactivity determination.

1. Non-Retroactivity of New Laws Is Simply the Legislative Default.

At both the federal and state levels, new laws, by default, are not retroactive. The common legislative practice is to include within legislation "savings clauses" that are designed to address the common law doctrine of abatement. See *Tynen*, 78 U.S. 88 (explaining common law of abatement); see also Comment, *Today's Law And Yesterday's Crime: Retroactive Application of Ameliorative Legislation*,

121 U. Pa. L. Rev. 120, 127-28 (1972). In short, "[i]t is a general rule that statutes operate prospectively." *Id.* at 120. By its own terms, the savings clause North Carolina included within Structured Sentencing preserved the state's ability to prosecute and maintain existing prosecutions for offenses that preceded the law's effective date.[6] The savings clause did not presume to limit the new law's authority to classify the severity of pre-enactment offenses for purposes of recidivism enhancements. In fact, since savings clauses follow the default rule that "statutes operate prospectively," *id.* at 120, it necessarily follows that Structured Sentencing retains that classification authority as of its effective date. The Fourth Circuit incorrectly assumed that retroactive application of a law is the norm, and it compounded its error by holding that prospective application indicates a deliberate choice to distinguish pre-enactment and post-enactment offenses which are otherwise identical.

2. Retroactivity Involves a Remedial, Not a Normative, Decision

Moreover, as the Second Circuit emphasized in *Darden*, a retroactivity determination is remedial in nature. 539 F.3d at 127-28. Applying this Court's decision in *Danforth* v. *Minnesota*, 552 U.S. 264

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6 The savings clause reads: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences." 1993 N.C. Sess. Laws c. 538, § 56 (*amended by* 1994 Ex. Sess. Laws c. 24, § 14(b)); *see also* N.C. Gen. Stat. § 15A-1340.10.

(2008), the Second Circuit explained that the decision whether to make a newly recognized legal right retroactive should not be confused with an assessment of the temporal scope of the legal right. *Darden*, 539 F.3d at 127-28 (citing *Danforth*, 552 U.S. at 290-91 (clarifying that "retroactivity . . . is primarily concerned . . . with the availability or non-availability of remedies")). Retroactivity involves a decision about remedy, not a decision about harm. It is therefore irrelevant to ascertaining a state's view of the seriousness of a given offense. In *Darden*, the court of appeals held that "the legislative history of the [New York Drug Law] Reform Act amply confirms that the purpose of the Reform Act was to replace the harsh Rockefeller sentencing laws with more appropriate sentencing laws, not to recognize a new class of drug offenses that were less serious *because* they were committed after the statute's effective date." 539 F.3d at 126-27 (emphasis in original).

3. Retroactive Application of Structured Sentencing Would Raise Serious *Ex Post Facto* Concerns.

Finally, North Carolina could not have retroactively applied Structured Sentencing without risking *ex post facto* challenges from persons who had been prosecuted and sentenced under the old law. See *Weaver* v. *Graham*, 450 U.S. 24, 33 (1981) (explaining *ex post facto* violation is a provision which "substantially alters the consequences attached to a crime already completed, and therefore changes 'the quantum of punishment'"). For those already serving prison terms at the time of Structured Sentencing's enactment, retroactive application would have increased imprisonment time because Structured Sentencing eliminated the old law's generous parole

provisions and 'day-for-day' gain-time credits. *Id.* at 35-36 (holding that a "new provision [which] constricts the inmate's opportunity to earn early release . . . runs afoul of the prohibition against *ex post facto* laws"); see also *Teasley* v. *Beck*, 574 S.E.2d 137, 139 n.1 (N.C. Ct. App. 2002) (summarizing North Carolina's parole and gain-time provisions repealed by Structured Sentencing).

Applying Structured Sentencing retroactively to offenders not yet prosecuted or sentenced would have been equally problematic. Under the old law, "judges were not bound by presumptive dispositions in most instances; it was within their discretion whether to order a prison or probationary sentence." *Commission Report*, at 3. Under Structured Sentencing, each combination of offense class and prior record level yields a particularized statutory minimum and maximum sentence that did not exist under the old law. See N.C. Gen. Stat. §§ 15A-1340.17(c)-(d). Since Structured Sentencing eliminated parole and severely restricted gain-time, "all offenders sentenced under the new law [would] serve 100 percent of the minimum term." See Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina*, 29 Crime & Just. 39, 86-87 (Univ. Chicago 2002) (*Counting the Cost*); *Commission Report*, at 17 (emphasizing that under Structured Sentencing, "[i]nmates would be allowed to earn time off the maximum sentence but would never serve less than the minimum sentence").

Although Structured Sentencing reduced the statutory maximums for several offense classes, it effectively increased the minimum sentence for an offense from no imprisonment to one of active incarceration. *Ex post facto* concerns would therefore have arisen from retroactive application of

Structured Sentencing because defendants would have faced higher statutory mandatory minimums under the new law. *Miller* v. *Florida*, 482 U.S. 423, 431-34 (1987) (holding retroactive application of state's amended guideline sentencing scheme violated *Ex Post Facto* Clause).

B. North Carolina Made Structured Sentencing Non-Retroactive For Administrative Reasons And Not Because Of A Legislative Judgment That Pre-Structured Sentencing Offenses Were More Serious Than Offenses Committed After The Law's Enactment.

Even if, *arguendo*, a state's non-retroactivity decision could speak to the question of offense seriousness, North Carolina made no such statement in its decision. Structured Sentencing created significant administrative and budgetary issues generated by the near-total revision of sentencing laws and policies, and these are the reasons the state did not make its new law retroactive.

1. North Carolina's Retroactivity Decision Was Driven by Financial and Other Administrative Concerns.

Primarily, North Carolina needed to ensure that its prison system had adequate funding so as to minimize the risk of a federal take-over. See *Commission Report*, at 20-21 (emphasizing, "[r]esource considerations played a large role in the Commissions work," in order to "ebb the tide of prison overcrowding"). The legislature conditioned the implementation of Structured Sentencing upon predictive models of future prison populations and upon the resources available to finance prison

construction to keep pace with the projected growth of the prison population. *Id.* at 20-22; N.C. Gen. Stat. § 164-40. The legislature also required a "fiscal note" to predict increased prison population in order to accurately forecast future prison construction costs. § 164-43; see *Counting the Cost*, 29 Crime & Just. at 81.

The fact that administrative and budgetary concerns dictated Structured Sentencing's effective date dispels any assumption that the law's effective date and its non-retroactivity derived from a judgment about offense severity. Indeed, the North Carolina legislature advanced the law's effective date from January 1, 1995 to October 1, 1994, as part of an appropriations bill. See N.C. Gen. Stat. § 15A-1340.10 (*amended by* 1994 N.C. Ex. Sess. Laws, c. 24, § 14(b)); see also *Commission Report*, at 23 (explaining the legislature set Structured Sentencing's effective date, "[i]n order to provide adequate appropriations"). It strains logic to conclude that the state moved the date of enactment forward so as to make drug offenses committed in the last three months of 1994 less serious than those committed earlier.

2. There Was No Penological Need for North Carolina to Make Structured Sentencing Retroactive.

North Carolina designed Structured Sentencing as a "truth in sentencing" reform. Structured Sentencing calculated the minimum and maximum imprisonment terms for an offense in accordance with the average time that was actually served for the same offenses under the old law. See *Counting the Cost*, 29 Crime & Just. at 64 (noting that Structured Sentencing "included lower-level drug crimes in the structure . . . without changing the average time

served for those crimes under the [old law]"); *Commission Report*, at 5, 17 (explaining that to determine the prescribed minimum and maximum sentences, the Commission "reviewed current and historical sentencing practices and time served in North Carolina and looked at average sentence lengths in other states"). Since Structured Sentencing was essentially punishment neutral, and because it primarily eradicated the artificially high statutory maximums and sentences that bore no relation to the time defendants realistically spent in prison, North Carolina had no need to give the new law retroactive effect in order to achieve equivalent punishment between old and new offenders.

The reasons supporting North Carolina's retroactivity determination are not idiosyncratic. Other states have been similarly motivated by administrative rather than normative concerns in deciding to make their sentencing reforms prospective. Just as the Second Circuit observed when addressing the non-retroactivity of New York's new sentencing laws, for North Carolina "there is no reason to believe that the non-retroactivity [decision] . . . reflects a state legislative view" that pre-Structured Sentencing offenses "were categorically more serious than those taking place after [Structured Sentencing]." *Darden*, 539 F.3d at 127 (internal quotation marks omitted). Rather, the "non-retroactivity provision was almost surely enacted to combat problems of retroactive administration." *Id.* at 126.

C. Structured Sentencing's Recidivism Provisions Conclusively Demonstrate That Offense Date Plays No Part In North Carolina's Current Judgment About The Seriousness Of That Offense.

Importantly, North Carolina makes the state's current law the measure of an offense's seriousness when that offense is considered for recidivist purposes. Through Structured Sentencing, North Carolina created recidivism enhancements that are determined by ascribing a point value to prior convictions based on the seriousness of the offenses. N.C. Gen. Stat. §§ 15A-1340.14, 15A-1340.17; see *Commission Report*, at 13 ("The more serious the prior conviction, the higher the points assigned to the defendant."). Courts must use the current law's offense classifications, regardless of whether a defendant committed the offense before or after Structured Sentencing's effective date. See § 15A-1340.14(c) (clarifying that for calculating criminal history record level under Structured Sentencing, i.e., recidivism enhancements, a sentencing court must use the current classification of an offense, even though the conviction for that offense preceded enactment of Structured Sentencing); see also *Watkins*, 672 S.E.2d at 52-53 (applying Structured Sentencing classification for sale of cocaine (a class G felony) to pre-Structured Sentencing conviction for sale of cocaine (then, a class H felony)). Thus, North Carolina has determined that for purposes of imposing recidivism enhancements, offense severity does not depend on the date a person commits that offense.

Structured Sentencing's recidivism provisions evince North Carolina's decision that its current law, not the old law, determines the seriousness of an

offense, including those committed prior to the current law's effective date. This determination not only proves the error of the Fourth Circuit's assumption about the retroactivity decision, it accords with ACCA's plain language which requires that a state's current law determines the penalty which "is prescribed" for "an offense."

Finally, ACCA, interpreted in light of its purpose, leaves no ambiguity with respect to Petitioner's prior offenses: the maximum sentence that "is prescribed" by state law for these offenses is less than ten years. However, if any ambiguity remained between this reading of the statute and that advanced by the Fourth Circuit, the rule of lenity would compel the adoption of Petitioner's interpretation since the contrary interpretation would increase Petitioner's punishment in a manner not clearly intended by the statute. See *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992); *United States* v. *Bass*, 404 U.S. 336, 348 (1971) ("[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.").

III. UNLIKE PETITIONER'S READING OF THE ACCA STATUTE, THE FOURTH CIRCUIT'S APPROACH TO DETERMINING "SERIOUS DRUG OFFENSES" RESULTS IN ARBITRARY AND INEQUITABLE IMPOSITION OF ACCA'S PENALTIES AND RAISES SERIOUS CONSTITUTIONAL CONCERNS.

Petitioner's straightforward reading of § 924(e) is simple to apply and yields equitable outcomes. A federal court can easily determine whether a prior state conviction qualifies as "serious drug offense"

simply by looking to the statutory maximum prescribed for the offense by current state law.

In contrast, the Fourth Circuit's construction of ACCA requires a court to take an extra step and ask when the prior convictions occurred. Not only is the Fourth Circuit's reading of the "serious drug offense" definition erroneous as a matter of statutory interpretation, it is also unworkable and unwise in a practical sense. If adopted, this reading will: (1) produce arbitrary results based on illogical distinctions between identical offenses; (2) raise constitutional concerns in the areas of due process, equal protection, and the Sixth Amendment; and (3) embroil federal courts in the mare's nest of a state's legislative history in search of an elusive answer regarding retroactivity, a fruitless venture that will waste judicial resources and produce inconsistent results.

First, the Fourth Circuit's construction of the "is prescribed by law" language creates inequities. The unfortunate defendant who commits the offense one day prior to the state law's effective date faces a fifteen-year mandatory minimum sentence, whereas a person who commits the same crime one day later will not have that exposure. The Fourth Circuit's reading of ACCA requires a federal court to view the same offense as serious in one case and not in another. It is a familiar rule of statutory construction that courts should not read a law in a way that produces arbitrary outcomes. *Griffin* v. *Oceanic Contractors*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). Petitioner's case demonstrates that the Fourth Circuit's reading of

ACCA produces such outcomes in the real world. The state drug offenses that made Petitioner an armed career criminal and exposed him to no less than fifteen in years in prison cannot have the same consequence for anyone convicted of those offenses today.

Second, the Fourth Circuit's rule implicates several constitutional rights. The Court of Appeals' approach raises serious equal protection concerns because it mandates separate treatment of federal criminal defendants with identical criminal histories. The irrational distinction, based on nothing more than offense dates, results in disparate treatment between similarly situated individuals. See, *e.g.*, *Clements*, 457 U.S. at 967 ("[T]hose classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution.").[7]

Moreover, the Fourth Circuit's rule requires a federal sentencing court to enhance a defendant's sentence based on a fact about a prior conviction that is not always apparent on the face of the conviction. In the present case, Petitioner's convictions preceded Structured Sentencing, so the sentencing court could easily find that Petitioner's offense dates also preceded the new law's enactment. In other cases, however, sentencing courts may encounter individuals with convictions that occurred soon after Structured Sentencing went into effect. Those cases will require district courts to make factual findings

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7 Classifications that would violate the Fourteenth Amendment's Equal Protection Clause violate the Fifth Amendment's Due Process Clause as a matter of law. *See Johnson* v. *Robison*, 415 U.S. 361, 364 n.4 (1974). Accordingly, the Fourth Circuit's rule raises concerns under the Due Process Clause, though the relevant case law speaks in terms of the Equal Protection Clause.

on matters that in all likelihood will not have been litigated at the state level. Imposing an ACCA sentence based on judicial fact-finding of this kind creates strong tensions with the Sixth Amendment. See *Apprendi*, 530 U.S. at 490; *Darden*, 539 F.3d at 123 n.11. It is familiar that a statute should not be construed so as to raise "serious constitutional problems." *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Reading § 924(e) as requiring that the penalty in effect at the time of the federal sentencing be used to measure an offense's seriousness raises none of the Due Process Clause or Sixth Amendment concerns implicated by the approach the Fourth Circuit employed in this case.

Third, using the Fourth Circuit's approach will prove vexing. The rule the Court of Appeals announced appears to be simple only because North Carolina made simple sentencing reforms. Effectively, the state changed only the statutory maximums for its felonies. That, coupled with the fact that North Carolina has no statute of limitations, permitted the Fourth Circuit to compute with relative ease the sentence Petitioner would have faced had he been punished today. Other states, however, may change their sentencing practices in ways that make difficult and cumbersome, if not impracticable, the Court of Appeals' reading of ACCA. Were a state, for example, to have a statute of limitations for crimes, a federal sentencing court would need to determine whether the particular offense still fell within the statute, an inquiry that might involve complicated questions in areas such as state tolling provisions.

Moreover, in some states, it may be impossible to apply the Fourth Circuit's rule. Delaware, for example, permits an individual who committed

crimes prior to June 1990 to choose, for sentencing purposes, between the law in place at the time of the offense and the law in force at the time of sentencing. Del. Code Ann. tit. 11, § 4216(d) ("Any individual convicted of a crime on or after January 1, 1990, which crime occurred prior to June 30, 1990, may elect to be sentenced under the provision of the Truth in Sentencing Act of 1989 rather than under the provisions of this title."). Under the Fourth Circuit's approach, a Delaware conviction would simultaneously be for a serious offense and for a non-serious offense. It would be difficult, if not impossible, to apply ACCA in such a situation.[8] To avoid this result, an approach other than the one used by the Court of Appeals would be necessary.

Finally, the unique complexities of a particular state's savings clauses will invariably yield inconsistent interpretations by federal courts. Indeed, in *Hinojosa*, the Fifth Circuit appears to have misunderstood the retroactivity provision from the Tennessee law at issue in the Sixth Circuit case of *Morton*. See *Hinojosa*, 349 F.3d at 205 ("This case is

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8 Delaware is not the only state that permits a defendant facing punishment for an offense committed prior to the effective date of a new criminal provision to elect between the old law and the new law. *See Today's Law And Yesterday's Crime*, 121 U. Pa. L. Rev. at 129 nn 66 & 68 ("In a number of jurisdictions, if a change in law mitigates the former punishment, the lower penalty may be imposed either at the defendant's election, or with his consent, at the court's election, or automatically."); *see also* Ky. Rev. Stat. Ann. § 446.110 (West 2006) (permitting imposition of lower penalty with defendant's consent); 5 Ill. Comp. Stat. Ann. 70/4 (West 2005) (same); W. Va. Code Ann. § 2-2-8 (West 2006) (same). Thus, the impossibility of applying the Fourth Circuit's rationale to the ACCA determination is not limited to one state.

distinguishable from *Morton*, however. Texas' revised sentencing scheme specifically provides that the revised sentences do not apply to crimes committed before the effective date of the revisions."). Tennessee only gave retroactive effect for those sentenced after the effective date of the state's law for offenses committed within a certain time period prior to that effective date. See Tenn. Code Ann. § 40-35-117(b). For those who committed offenses outside of that time period, the old law applied. § 40-35-117(c). Thus, as the Second Circuit correctly observed, "the Tennessee statute is not retroactive in the relevant sense." *Darden*, 539 F.3d at 123 n.9. The apparent difference in understanding by the appellate courts regarding the retroactivity of one state's law illustrates a difficulty that can be avoided by simply referring to a state's current law. See *United States* v. *Santana*, No. 09-CB-1022, 2011 WL 260744, at *8 (S.D.N.Y. Jan. 20, 2011) (listing states that permit partial retroactive application of a new law mitigating punishment).

Under Petitioner's plain-language reading of ACCA, it cannot be disputed whether or not a state deems one of its drug offenses to be serious. The present penalty for the crime answers that question. Under Petitioner's reading, moreover, disparate application of the statute is avoided. When a serious drug offense is determined with reference to the current state law, a given offense will be deemed "serious" in all cases or in none, and it will thus be a predicate in all cases or in none. Petitioner's reading does not require sentencing courts to treat the same offense differently depending upon the particular defendant or to find facts about prior convictions. It raises no constitutional concerns in ACCA's application. Petitioner's approach to determining

offense seriousness is simple, consistent, and equitable. He respectfully urges this Court to adopt that reading of the ACCA text.

CONCLUSION

This Court should reverse the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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STATUTORY APPENDIX

STATUTORY APPENDIX

Title 18, Section 924(e):

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive

device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

RESPONDENT'S BRIEF

No. 10-5258

In the Supreme Court of the United States

CLIFTON TERELLE MCNEILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Armed Career Criminal Act of 1984 provides a 15-year minimum sentence for a convicted felon who possesses a firearm in violation of 18 U.S.C. 922(g)(1), if that person "has three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). A "serious drug offense" is defined to include a state-law drug offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). Petitioner was convicted of drug offenses that occurred in North Carolina in 1991, 1992, and 1994, when the maximum term of imprisonment for such offenses was ten years or more. Before petitioner's current prosecution under Section 922(g), North Carolina changed its sentencing scheme and provided significantly lower maximum sentences for similar drug offenses that were committed after October 1, 1994. The question presented is as follows:

Whether, in determining that a prior state offense is one "for which a maximum term of imprisonment of ten years or more is prescribed by law" for purposes of 18 U.S.C. 924(e)(2)(A)(ii), a federal sentencing court is required to look to the maximum penalty prescribed by state law at the time of the federal sentencing, without regard to whether the State has made that law retroactively applicable to the defendant's offense.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 126-136) is reported at 598 F.3d 161. The order of the district court (J.A. 109-125) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2010. A petition for rehearing was denied on April 5, 2010 (J.A. 137). The petition for a writ of certiorari was filed on July 2, 2010, and granted on January 7, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); and on one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1). Petitioner thereupon became subject to scrutiny under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), which was enacted to supplement state enforcement efforts in addressing the threat to public safety posed by career criminals. *Taylor* v. *United States*, 495 U.S. 575, 581 (1990). As amended, ACCA provides a 15-year minimum sentence for a person convicted of possessing a firearm in violation of 18 U.S.C. 922(g), if that person "has three previous convictions" for "a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1). The statute defines a "serious drug offense" as, *inter alia*, a state-law offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * *, for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii).

Petitioner disputed that his prior state-law drug offenses qualified as "serious drug offense[s]," arguing that the State of North Carolina had, since the time he was convicted of the predicate offenses, reduced the maximum term of imprisonment for those kinds of offenses to a period shorter than ten years—even though the State had not made that amendment applicable to previously committed offenses. The district court rejected that argument and applied a sentence enhancement under ACCA. It also departed upward from the

advisory Guidelines range, sentencing petitioner to 300 months of imprisonment, to be followed by five years of supervised release. J.A. 82, 84. The court of appeals affirmed. J.A. 126-136.

1. On February 28, 2007, an officer with the Fayetteville, North Carolina, Police Department tried to stop the vehicle that petitioner was driving after it ran a red light. Petitioner evaded the officer for several miles, then came to an abrupt stop and fled on foot. An officer chased petitioner, tackled him, and found a .38-caliber Smith & Wesson revolver under his body. A search of petitioner found 3.1 grams of crack cocaine, packaged for distribution, along with $369. J.A. 46, 110.

2. a. On January 2, 2008, a grand jury in the Eastern District of North Carolina returned a three-count indictment against petitioner, charging him with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 924; one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1); and one count of knowingly possessing a firearm during and in relation to a federal drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A)(i). J.A. 13, 29-30. At a hearing on August 18, 2008, petitioner pleaded guilty to the first two counts; under the plea agreement, the government agreed to dismiss the third count (which would have carried a mandatory, consecutive sentence of at least five years). J.A. 18, 31-40; 18 U.S.C. 924(c)(1)(A)(i) and (D)(ii). With respect to the felon-in-possession count, the plea agreement expressly stated that petitioner would be subject to a mandatory minimum sentence of 15 years and a maximum of life imprisonment if his criminal history made ACCA's sentence enhancement applicable. J.A. 36.

b. Petitioner has an extensive criminal history, including, as relevant here, four 1992 convictions for the sale of cocaine on four different days in October 1991 (J.A. 47-49) and two 1995 convictions for possession with intent to manufacture, sell, or deliver cocaine in February 1992 and September 1994 (J.A. 50, 53). Petitioner has not disputed that two other prior convictions under North Carolina law—for assault with a deadly weapon and common-law robbery (J.A. 53-55)—qualified as "violent felon[ies]" for ACCA purposes. J.A. 77, 129 n.1. Petitioner has, however, contended that his cocaine-related convictions should not be considered "serious drug offense[s]" for ACCA purposes, because, after he committed them, intervening changes in North Carolina law reduced the maximum term of imprisonment for such offenses to less than ten years. J.A. 75-76, 117-118.

When petitioner committed the drug offenses for which he was convicted in 1992 and 1995, those offenses were Class H felonies subject to a maximum term of imprisonment under North Carolina law of ten years. See J.A. 76 (petitioner's sentencing memorandum); Pet. Br. 7; see also N.C. Gen. Stat. § 14-1.1(a)(8) (Michie 1993) (repealed effective Oct. 1, 1994) ("A Class H felony shall be punishable by imprisonment up to 10 years, or a fine or both."). Petitioner in fact received ten-year sentences for his convictions. See J.A. 47-50, 53. In 1993, however, North Carolina revamped its sentencing laws by enacting the Structured Sentencing Act. J.A. 131-132. Since that Act took effect on October 1, 1994, offenses involving the sale (or possession with intent to distribute) of less than 28 grams of cocaine have been either Class G or H felonies, for which the maximum

terms of imprisonment would be 38 or 30 months.[1] Those lower maximum terms of imprisonment, however, have not been made applicable to earlier offenses. Instead, the structured-sentencing regime expressly applies only to "offenses * * * that occur on or after October 1, 1994." N.C. Gen. Stat. § 15A-1340.10 (2009); see also *State* v. *Branch*, 518 S.E.2d 213, 215 (N.C. Ct. App. 1999) (noting that offenses committed before that date are governed by the earlier sentencing regime).

c. In the Presentence Investigation Report (PSR), the probation office concluded that petitioner's prior drug offenses were ACCA predicates. J.A. 66. The re-

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[1] In the district court, petitioner said (J.A. 76) that the "longest term of imprisonment" someone could receive under the Structured Sentencing Act for his cocaine-related offenses is 25 months. But, as petitioner now acknowledges (Br. 7 & n.3), the maximum possible term of imprisonment for a sale of less than 28 grams of cocaine is actually 38 months, because that has been a Class G felony since December 1, 1997. See N.C. Gen. Stat. §§ 15A-1340.17(c) and (d), 90-95(a)(1) and (b)(1)(i) (2009); 1997 N.C. Sess. Laws 443, § 19.25(b) and (jj). And the maximum possible term of imprisonment for a cocaine-possession-with-intent-to-distribute offense that occurred after October 1, 1994, is actually 30 months, because that is a Class H felony. See N.C. Gen. Stat. §§ 15A-1340.17(c) and (d), 90-95(a)(1) and (b)(1); see also *State* v. *Mullaney*, 500 S.E. 2d 112, 114 (N.C. Ct. App. 1998) ("Under Structured Sentencing, the maximum possible term of imprisonment for a Class H felony is thirty months.").

Petitioner's earlier mistaken reference to a 25-month maximum may have been due to the punishment chart associated with North Carolina's Structured Sentencing Act. It provides for ranges of *minimum* terms of imprisonment, and the range for a Class H felony committed by an offender with the highest "prior record level" under circumstances justifying an "aggravated sentence" is 20-25 months. See N.C. Gen. Stat. § 15A-1340.17(c) (2009). The maximum sentence must then be derived from the minimum sentence through application of a separate table. The maximum sentence corresponding to a 25-month minimum is 30 months. *Id.* § 15A-1340.17(d).

sulting enhancement under the Armed Career Offender Guideline, § 4B1.4, increased his adjusted offense level from 28 to 34, but after a three-level adjustment for acceptance of responsibility, his total offense level was 31. J.A. 66. The PSR detailed petitioner's criminal history, which included 12 felony convictions between 1992 and 2007 (including three crimes involving guns) and several additional misdemeanors. J.A. 47-59. The PSR also noted that petitioner's offense conduct in this case occurred approximately seven months after he had been released from state custody, J.A. 59, and that he had since been convicted of additional state-law felonies, for which he had been sentenced to 72 to 96 months of custody, with a projected release date of July 4, 2012, J.A. 56, 58. The PSR calculated a criminal history category of VI. J.A. 59-60. That resulted in an advisory Guidelines range of 188-235 months, but the PSR noted that "[t]he court may wish to consider an upward departure * * * if reliable information indicates that [petitioner's] criminal history category substantially under-represents the seriousness of [his] criminal history or the likelihood that [he] will commit other crimes." J.A. 69.

d. At sentencing, petitioner contended that his prior drug convictions should not be considered "serious drug offense[s]" for purposes of ACCA because, although those offenses had been subject to "maximum statutory sentences" of "at least 10 years" when he was convicted, his "precise offenses no longer carry such an extensive punishment." J.A. 76. He claimed that an ACCA sentence enhancement would create an unwarranted sentencing disparity in light of the fact that, "[f]or more than 12 years, these types of convictions simply have not come close to constituting 'serious drug offenses.'" *Ibid.* Petitioner acknowledged that he qualified as a career

offender under Sentencing Guidelines § 4B1.1, and he calculated that, without an Armed Career Criminal enhancement under Guidelines § 4B1.4, his advisory Guidelines range would be 151-188 months. J.A. 77. He requested a sentence of 188 months. *Ibid.*

3. On January 13, 2009, the district court sentenced petitioner to 300 months of imprisonment on count one and to 240 months of imprisonment on count two, both sentences to run concurrently with each other, but consecutively to the state term that petitioner was serving; the term of imprisonment was to be followed by five years of supervised release. J.A. 80-92.

The district court adopted the findings of the PSR and calculated an advisory Guidelines range of 188 to 235 months. J.A. 93, 95. The court rejected petitioner's argument that he should not receive a sentence enhancement under ACCA. J.A. 117-118. It recognized that petitioner's offenses would not have been serious drug offenses if they had been committed at later dates.[2] But, the court explained, petitioner "chose to commit the [state-law drug] offenses when he did and was convicted

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[2] As petitioner had in his sentencing memorandum (J.A. 76), the district court stated that North Carolina's Structured Sentencing Act went into effect on December 1, 1995 (J.A. 117-118). In fact, as noted above, it generally applies to offenses committed on or after October 1, 1994. See p. 5, *supra*; see also Pet. Br. 8. The December 1, 1995, date was relevant to some amendments that altered the punishment chart, but not in ways that affected the maximum terms of imprisonment associated with Class G or H felonies. There is now another punishment chart, which applies to felonies committed on or after December 1, 2009, but which, again, has not altered the maximum terms of imprisonment associated with Class G or H felonies. All three iterations of the punishment chart that have applied to felonies committed since October 1, 1994 are available at http://www.nccourts.org/Courts/CRS/Councils/spac/Sentencing/Default.asp (visited Mar. 28, 2011).

and sentenced in North Carolina shortly thereafter. Under the ACCA, a court looks to the maximum sentences for the offenses at issue at the time of the offense." J.A. 118 (citing *United States* v. *Williams*, 57 Fed. Appx. 553, 556 (4th Cir. 2003)). Thus, the court held that petitioner's "prior drug convictions are serious drug offenses, and [he] is properly designated an armed career criminal under 18 U.S.C. § 924(e)." *Ibid.*

The district court further decided to make an upward departure under Sentencing Guidelines § 4A1.3, finding that petitioner's "criminal history category substantially underrepresents the seriousness of his criminal history or his likelihood of recidivism." J.A. 119. The court explained that petitioner "has a long and unrelenting history of serious criminal conduct," including "many types of criminal behavior, with an emphasis on illegal drugs and violence," that had resulted in petitioner "and three other individuals being shot, leaving one dead." J.A. 119-120. It observed that "[t]he North Carolina criminal justice system ha[d] not deterred [petitioner]," even though he had been sentenced to ten years of imprisonment at the age of 16. J.A. 120. Analyzing successively higher offense levels, the court found that an offense level of 34 "contains the guideline range most appropriate for this case" (262 to 327 months). J.A. 121.

The district court then considered the sentencing factors under 18 U.S.C. 3553(a), "all the facts and circumstances of this case, the PSR, and all arguments and filings of counsel" and sentenced petitioner to "a term of 300 months for count one and 240 months for count two (the statutory maximum)." J.A. 123-124. Finally, the court stated that, even if it had "incorrectly calculated the advisory guideline range or ha[d] erroneously de-

parted," it would still "impose the same 300-month and 240-month sentences as variance sentences." J.A. 124.

4. The court of appeals affirmed petitioner's sentence. J.A. 126-136. It reviewed *de novo* whether petitioner's prior drug offenses qualified as predicate offenses under ACCA. J.A. 128.

Petitioner relied on ACCA's definition of a "serious drug offense" as one "for which a maximum term of imprisonment of ten years or more *is* prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii) (emphasis added). As the court of appeals summarized, he contended that "the statute's use of the present tense 'is' reflects congressional intent to defer to a state's current judgment regarding whether it deems a particular drug offense serious," and it can thus be triggered only by a state offense that "carr[ies] a maximum penalty of at least ten years in prison at the time of the defendant's *federal* sentence." J.A. 129-130; see also Pet. C.A. Br. 18-19.

The court of appeals concluded that petitioner's drug convictions were properly found to be ACCA predicates because they "were punishable by a maximum term of imprisonment of at least ten years both at the time he committed the offenses and at the time of his federal sentencing." J.A. 132. The court explained that, "[w]hen North Carolina revised its sentencing scheme in 1994, it specifically provided that the revised sentences would not apply to crimes committed before the effective date of the revisions. In effect, then, North Carolina has two sentencing schemes—one governing offenses committed before October 1, 1994, and another governing offenses committed after October 1, 1994." J.A. 131-132 (citations omitted). In light of the simultaneous persistence of those two schemes (and the lack of a statute of limitations under North Carolina law for felony of-

fenses), the court concluded that, "[i]f [petitioner] were tried and convicted today for his drug offenses committed in 1991, 1992, and September 1994, he would be subject to the higher sentences imposed by the pre-October 1994 sentencing statutes." J.A. 132 & n.2.

In relying on North Carolina's determination that its new sentencing regime does not apply to crimes committed before its effective date, the court of appeals found "persuasive" the Fifth Circuit's decision in *United States* v. *Hinojosa*, 349 F.3d 200 (2003), cert. denied, 541 U.S. 1070 (2004), which turned on Texas's decision not to make a revised sentencing scheme applicable to earlier offenses, holding that, "even under" a rule that looks to "the maximum sentence for a previous conviction at the time of federal sentencing," Hinojosa "would still be subject to a maximum term of at least ten years." *Id.* at 205. The court of appeals disagreed with the Second Circuit's decision in *United States* v. *Darden*, 539 F.3d 116 (2008), which had found the nonretroactive nature of New York's 2005 reforms of its drug laws to be irrelevant to ACCA's applicability, because it concluded that "ACCA instructs courts to defer to state lawmakers' current judgment about the seriousness of an offense as expressed in their current sentencing laws." *Id.* at 128.[3]

SUMMARY OF ARGUMENT

Petitioner contends that, for purposes of determining whether his prior state-law drug offenses are "previous convictions" that trigger a sentence enhancement under the Armed Career Criminal Act of 1984, 18 U.S.C.

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[3] The court of appeals also rejected petitioner's challenges to the procedural and substantive reasonableness of the district court's upward departure, J.A. 132-136, which petitioner has not renewed in this Court, Pet. Br. 3 n.1.

924(e), the "maximum term of imprisonment" associated with his prior state-law drug offenses should be judged as if those offenses had been committed on the date of his federal sentencing. He thus disregards the maximum sentences to which he was actually exposed (and in his case, the ten-year sentences he actually received). He also disregards the sentences that state law still prescribes for offenses (like his) that were committed before October 1, 1994. The judgment in this case should be affirmed whether the Court evaluates the maximum sentence for petitioner's predicate convictions by reference to the time he received them or by reference to the time of the federal sentencing proceeding. Under either analytical approach, the law applicable to the offenses underlying his previous convictions prescribes a maximum term of at least ten years of imprisonment.

A. The relevant time for evaluating the "maximum term of imprisonment" associated with a defendant's conviction for a potential predicate offense is the time of the sentencing for that conviction.

1. Petitioner's thesis that a court applying ACCA should look to the maximum sentence for a prior offense at the time of the federal sentencing relies chiefly on the present-tense verb "is" in ACCA's definition of a serious drug offense. In context, however, that verb refers to the time of the conviction for which the maximum sentence is at issue, consistent with the meaning of the rest of the same definition. Petitioner's focus on the time of sentencing for the Section 922(g) offense is inconsistent with this Court's approach in *United States* v. *Rodriquez*, 553 U.S. 377 (2008). In that case, the Court identified a prior offense's maximum term for ACCA purposes based on its analysis of the Washington statutes that applied "[a]t the time of respondent's drug of-

fenses." *Id.* at 381. Petitioner's interpretation is also inconsistent with the rationale of *Rodriquez*, because his reading would mean that the "maximum term of imprisonment * * * prescribed by law" for his prior offense was lower than the sentence that he actually could have received (and in fact did receive). See *id.* at 383.

2. ACCA's overall structure reinforces the focus of the definitional provisions on the time of the prior conviction. The definition in ACCA of "violent felony" is immediately adjacent to that for "serious drug offense." That definition also contains present-tense verbs, but they have been construed as referring to the time of the underlying conviction, not the time of the federal sentencing to which ACCA may apply. Moreover, the evolution of ACCA's statutory text and the legislative history suggest that Congress's addition to ACCA of "serious drug offense[s]" and "violent felon[ies]" was intended only to expand the scope of ACCA's predicate offenses. It was not intended to alter a prior conviction's status as a predicate offense whenever a state legislature changes the maximum sentence for a similar offense committed at a later date (without making that change retroactively applicable to prior offenders).

3. Evaluating the maximum penalty associated with a previous conviction as of the time of that conviction avoids the serious practical difficulties associated with petitioner's hypothetical inquiry about current-day sentencing and better serves ACCA's purposes. Petitioner's approach creates serious difficulties whenever a State amends the offense definition between the time of the original conviction and the time of the federal sentencing. Under his approach, if a State decided to legalize certain drugs and decriminalize their use and distribution, there could be no "maximum term of imprison-

ment" for former offenses involving those drugs. That would mean that "previous convictions" for those offenses would vanish for ACCA purposes, even if the State had deliberately preserved those convictions as a matter of state law by making the decriminalization only prospective. Petitioner's reading would also allow a mandatory minimum sentence under ACCA to depend on the happenstance of the timing of the federal sentencing proceeding (rather than the timing of the defendant's state and federal criminal offenses).

The government's reading avoids the difficulties and inconsistencies associated with petitioner's reading. Nor does it present the difficulties that petitioner attributes to it. Although petitioner suggests it might be difficult to determine when a prior offense occurred, ACCA already requires the sentencing court to determine whether the defendant's "three previous convictions" were "committed on occasions different from one another." 18 U.S.C. 924(e)(1). Moreover, a sentencing court must evaluate the "statutory elements" of an offense to determine whether it qualifies as an ACCA predicate, which presumes an ability to determine which statutory regime was in effect at the time of the offense. See *Shepard* v. *United States*, 544 U.S. 13, 16 (2005).

4. The government's approach is consistent with similar inquiries in other statutes addressing recidivists.

B. Even if the maximum penalty associated with a prior conviction should be determined as of the time of the ACCA proceeding, the nonretroactive nature of intervening changes in state law should be taken into account. The sole relevant question is *what* the "maximum term of imprisonment * * * prescribed by [state] law" for the defendant's prior offense actually is—not *why* the State decided to change a maximum sentence with-

out making that change applicable to previously committed offenses (such as petitioner's). Although "Congress chose to defer to the state lawmakers' judgment" about the seriousness of drug offenses for ACCA purposes, *Rodriquez*, 553 U.S. at 388, it did not intend that federal courts would look behind those judgments to determine whether the old or new sentencing regime better reflects the State's judgment. Nor does ACCA indicate an intention to incorporate (as petitioner suggests) state-law viewpoints on how prior convictions are to be treated under state recidivism statutes.

C. In this case, the maximum sentences for petitioner's previous cocaine offenses were ten years, whether they are judged as of the time of those convictions or as of the time of his federal proceedings. It is undisputed that, at the time of petitioner's prior convictions in 1992 and 1995, the maximum term of imprisonment for his offenses was ten years. Although North Carolina later reduced the maximum penalties associated with similar offenses if they were committed on later dates, it did not make those changes retroactive to offenses (like petitioner's) committed before October 1, 1994. N.C. Gen. Stat. § 15A-1340.10 (2009). Thus, even if petitioner were to be sentenced by a state court today for his prior convictions, he would still be subject to a maximum term of imprisonment of at least ten years.

Principles of lenity do not dictate a contrary result. In light of the context and structure of ACCA (as well as other federal recidivism provisions), petitioner's reading of Section 924(e)(2)(A)(ii) is not in equipoise with the approach of either the district court or the court of appeals in this case. Nor does petitioner's reading effectuate the underlying purposes of the rule of lenity. His rule does not provide fair warning of the consequences

of criminal conduct because it makes it impossible to know the punishment until long after a Section 922(g) offense is committed. And petitioner's reading would not consistently assist criminal defendants, because legislatures are as likely to increase as to decrease the maximum sentences associated with particular crimes.

ARGUMENT

Petitioner argues that in determining whether his previous state drug offenses are ones "for which a maximum term of imprisonment of ten years or more is prescribed by law" under the definition of "serious drug offense" in Section 924(e)(2)(A)(ii) of ACCA, a court should not consider the maximum term actually prescribed by state law for petitioner's previous offense. Instead, he contends, the court should consider the maximum term that state law would prescribe for that offense if it had been committed on the date of petitioner's federal sentencing. In other words, petitioner claims that for ACCA purposes he should receive the benefit of intervening changes in state sentencing law that have not been made retroactive and thus do not apply to his prior offenses as a matter of state law. Petitioner's interpretation is inconsistent with the statutory text, the structure of ACCA, and prior decisions of this Court. Under his interpretation, although he was actually sentenced to ten years of imprisonment for his prior offenses, the law prescribes a maximum term of less than ten years for those offenses. "It is hard to accept the proposition that a defendant may lawfully be sentenced to a term of imprisonment that exceeds the 'maximum term of imprisonment . . . prescribed by law,' but that is where [petitioner's] reading of the statute leads." *United States* v. *Rodriquez*, 553 U.S. 377, 383 (2008).

Petitioner contends both (1) that the maximum sentence for his predicate state-law convictions under ACCA should be determined "by reference to the state law in effect at the time of the federal sentencing" in this case, Br. 13 (capitalization modified); and (2) that the maximum sentence under "current state law" is to be determined without regard to whether current law "applies retroactively to the date the defendant committed the state offense," Br. 15 (capitalization modified). The district court correctly rejected petitioner's first contention. J.A. 118. The court of appeals, without resolving the first, correctly rejected the second. J.A. 131-132.

The judgment in this case should be affirmed whether the Court evaluates the maximum sentence for petitioner's predicate convictions by reference to the time he received them or by reference to the time of the federal sentencing proceeding on appeal here. But the government begins its analysis by addressing the temporal reference point for assessing whether an offense is punishable by the stated ten-year maximum in 18 U.S.C. 924(e)(2)(A)(ii).[4]

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[4] In its brief opposing certiorari, the government did not directly address the temporal reference point, instead stating (at 7-8) as follows: "The government assumes here that the statute's use of the present tense * * * refers to the applicable state sentence at the time of the federal prosecution, not at the time of the underlying state prosecution. In this case, * * * the applicable state sentence was a maximum term of imprisonment of 10 years both at the time of petitioner's state prosecution and at the time of his federal prosecution." Even though the court of appeals (unlike the district court) did not address the antecedent issue, it has been briefed by petitioner and is squarely included within the question presented, see Pet. Br. i (asking in relevant part whether ACCA's definition refers to "state law at the time of the federal sentencing").

A. The Maximum Potential Sentence Associated With A Prior Conviction Should Be Determined By Looking To The Sentence Applicable At The Time Of That Conviction

The relevant time for evaluating the "maximum term of imprisonment" associated with a defendant's conviction for a potential predicate offense is the time of the sentencing for that conviction. That answer is consistent with the text of the statute, its structure, and the way other recidivism statutes are construed. Moreover, because that construction is based on the actual "previous conviction" that makes an ACCA sentence enhancement potentially applicable, it is manifestly easier to apply than petitioner's proposed construction.

1. The present-tense verb in the reference to the maximum term of imprisonment that "is prescribed by law" refers to the time of the conviction that exposed petitioner to that potential penalty

a. Petitioner's argument that the maximum penalty for a state-law drug offense must be determined as of the time of the ACCA sentencing is grounded entirely on the use, in the statutory phrase "maximum term of imprisonment of ten years or more is prescribed by law," of the present-tense verb "is." Pet. Br. 13-15. That argument fails to account for the context of ACCA's definitions of predicate offenses.

ACCA applies to "the case of a person who violates [18 U.S.C. 922(g)] and has three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1). The accompanying definition of "serious drug offense" refers to "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a con-

trolled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). Petitioner reads the verb "is" in that provision to refer to the time of the federal sentencing proceeding at which an ACCA sentence enhancement may be imposed. In context, however, that verb refers to the time of the conviction for which the maximum sentence is at issue, consistent with the meaning of other verbs in the same definition.

No past-tense verbs appear in the substantive component of the definition of a state-law "serious drug offense" (*i.e.*, whether the offense is one "*involving* manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," 18 U.S.C. 924(e)(2)(A)(ii) (emphasis added)). Nevertheless petitioner does not seem to dispute that whether a prior offense meets that substantive component should be determined by reference to the time of the previous conviction rather than the time of the Section 922(g) prosecution. Indeed, it is difficult to see how the elements of a prior offense of conviction could be determined at any time other than when the conviction was imposed.

In that context, petitioner's view that ACCA turns on the maximum penalty for a former offense, not when it was imposed, but as of the time of the federal sentencing for the Section 922(g) violation, makes little sense. Both the nature of the prior offense and the maximum term by which it is punishable relate to the same time: when the defendant was convicted and punished.[5] Indeed,

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[5] Of course, if a State subsequently lowered the maximum penalty and made that reduction available to defendants previously sentenced as of the same date as the defendant now at issue, the defendant could plausibly look to that reduced maximum as stating the law applicable to his previous conviction. For example, if such a defendant had taken

even the amici supporting petitioner do not agree with his focus on the time of the federal sentencing.[6]

b. Construing the present tense of a statutory verb to correlate contextually with other times relevant to the statute's application is entirely consistent with this Court's cases. For instance, in *Woodford* v. *Ngo*, 548 U.S. 81 (2006), the Court considered a statutory requirement that "[n]o [federal-law] action shall be brought with respect to prison conditions * * * by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as *are* available are exhausted," 42 U.S.C. 1997e(a) (2000) (emphasis added). The Court held the administrative remedies that must be exhausted are those that were available when the prisoner's complaint arose, not those remedies that are available at the time federal suit is brought. 548 U.S. at 99-100; see also, *e.g.*, *Ingalls Shipbuilding, Inc.* v. *Director, Office of Workers' Comp. Programs*, 519 U.S. 248, 255 (1997) (statutory reference to a "person entitled to

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advantage of state sentence-modification proceedings to lower his sentence in accordance with a reduced maximum, cf. 18 U.S.C. 3582(c), that reduced maximum could apply to his conviction for ACCA purposes. Because no such retroactive modification of state sentencing law is at issue here, however, the Court need not address that issue.

[6] The amici argue instead that ACCA directs the federal sentencing court "to assess the seriousness of a predicate drug offense as of the time of the § 922(g) *violation*." NACDL Amicus Br. 5 (emphasis added). The two circuits that have ruled against the government, however, have adopted petitioner's approach and focused on the time of the federal sentencing proceeding. See *United States* v. *Darden*, 539 F.3d 116, 122 n.8 (2d Cir. 2008); *United States* v. *Morton*, 17 F.3d 911, 915 (6th Cir. 1994). In this case, the applicable sentence under North Carolina law did not change between February 28, 2007, when petitioner committed his felon-in-possession offense, and January 13, 2009, when he was sentenced for that offense.

compensation * * * [who] enters into a settlement with a third person" requires the entitlement to compensation to exist at the time of the settlement); *Weedin* v. *Chin Bow*, 274 U.S. 657, 667-668 (1927) (statutory context requires the phrase, "all children born outside the limits of the United States who are citizens thereof," to turn on whether those children were citizens at the time of birth, not whether they are citizens at the present time).

Although petitioner invokes (Br. 14) *Carr* v. *United States*, 130 S. Ct. 2229 (2010), the Court's opinion in that case instructively distinguished between the kind of provision it was construing and the kind of provision at issue here. In *Carr*, the Court stressed that it was applying "present-tense verbs that * * * proscribe conduct on a prospective basis." *Id.* at 2236 n.5. That is, of course, not what ACCA's sentencing enhancement does, because it does not proscribe any conduct. And the Court contrasted such proscriptive (and prospective) commands with "a definitional section that merely elucidates the meaning of certain statutory terms and proscribes no conduct." *Id.* at 2237 n.6. Here, Section 924(e)(2)(A)(ii) is part of such a definitional section, where context indicates that the appropriate reference point—for identifying both the nature of the prior crime and its maximum punishment—is the time of the prior conviction.[7]

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[7] The fundamental difference between this case and *Carr* is also illustrated by the Court's reluctance there to "construe[] a present-tense verb in a criminal law to reach preenactment conduct." 130 S. Ct. at 2236. Here, no matter which construction of ACCA the Court adopts, there is no doubt that the "present-tense verb[s]" in ACCA's definition of predicate offenses will "reach preenactment conduct." *Ibid.* See, *e.g.*, *Taylor* v. *United States*, 495 U.S. 575 (1990) (involving convictions

c. Notwithstanding petitioner's reading of the assertedly "plain language" of the verb tense in ACCA (Pet. Br. 14), this Court in *Rodriquez*, *supra*, described ACCA consistent with a time-of-conviction approach to determining the maximum sentence. *Rodriquez* addressed whether the "maximum sentence" under Section 924(e)(2)(A)(ii) should account for the greater sentences under Washington law for repeat drug offenders compared to first-time offenders. Rather than looking to current state law at the time of the respondent's felon-in-possession offense or at the time of the ACCA sentencing proceeding, the Court began its analysis by describing the Washington statutes that applied "[a]t the time of respondent's drug offenses." 553 U.S. at 381. It then repeatedly used past-tense verbs to characterize the maximum term of imprisonment prescribed by those statutes, without ever mentioning whether current law was the same. See *id.* at 381 ("[R]espondent *faced* a maximum penalty of imprisonment for 10 years."), 382 ("the maximum term that respondent *faced* on at least two of the Washington charges *was* 10 years"), 383 ("there is no dispute that [the Washington statute] *permitted* a sentence of up to 10 years"), 384 ("the maximum term prescribed by Washington law for each of respondent' two relevant offenses *was* 10 years"), 393 ("we hold that the 'maximum term of imprisonment . . . prescribed by law' for the state drug convictions at issue in this case *was* the 10-year maximum set by the applica-

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from 1963 and 1971, long before ACCA was enacted). Indeed, the very nature of a recidivism provision is to look back on prior crimes and enhance punishment for the present offense because the defendant is a repeat offender. See *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948) (habitual-offender sentence "is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one").

ble recidivist provision") (all emphases added). This is not to say that *Rodriquez* decided the issue in this case. But the Court's natural inclination to paraphrase in the past tense and to apply the statutes that were in effect at the time of the defendant's underlying drug offenses seriously undermines petitioner's submission (Br. 14) that ACCA's "plain language" directs a sentencing court to use "current" state law.

The rationale of *Rodriquez* further undercuts petitioner's interpretation. As the Court explained, "[i]t is hard to accept" a construction that would deem the "'maximum term of imprisonment . . . prescribed by law'" for purposes of Section 924(e)(2)(A)(ii) to be only "five years" when the defendant could in fact "ha[ve] been sentenced to, say, six years' imprisonment." 553 U.S. at 383. But, like the reading of the Ninth Circuit that the Court rejected in *Rodriquez*, that is precisely "where [petitioner's] reading of the statute leads." *Ibid.* Petitioner himself received ten-year sentences for his drug-related convictions (and, as a result of parole violations, served nearly all of that time in prison), J.A. 47-50, 53, even though he now contends that his "maximum term of imprisonment" should be deemed to be only 30 or 38 months, Pet. Br. 7 & n.3.[8] Of course, the "maximum term of imprisonment * * * prescribed" by state law may often exceed the actual sentence that a defen-

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[8] See 1/13/2009 Tr. 13 (at sentencing hearing, petitioner's counsel stated, in reference to the convictions described at J.A. 48-50, that petitioner "was sentenced to a ten year sentence and now * * * under the structured sentencing, I think the maximum somebody could possibly get * * * [is] something like 24 months"); Pet. C.A. Br. 5 (noting that petitioner received ten-year sentences for his 1992 and 1995 convictions); see also note 1, *supra* (describing calculation of sentences under North Carolina's Structured Sentencing Act).

dant received for his prior offense, but petitioner's counterintuitive position that his "maximum term" is far lower than the one that he actually could have received (and in fact did receive) remains a proposition that is "hard to accept." *Rodriquez*, 553 U.S. at 383.

2. ACCA's overall structure reinforces the focus of the definitional provisions on the time of the prior conviction

a. ACCA's structure strongly supports the conclusion that, throughout the definitional provisions, the present-tense verb "is" refers to the time of the prior conviction. The immediately adjacent provision, Section 924(e)(2)(B), defines "violent felony" for ACCA purposes. Like Section 924(e)(2)(A), it uses present-tense verbs. It applies to "any crime punishable by imprisonment for a term exceeding one year" that

> (i) *has* as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) *is* burglary, arson, or extortion, *involves* use of explosives, or otherwise *involves* conduct that *presents* a serious potential risk of physical injury to another[.]

18 U.S.C. 924(e)(2)(B) (emphases added). While petitioner contends that the plain meaning of the present tense of "is" in Section 924(e)(2)(A)'s definition of "serious drug offense" demands an evaluation of current state law (as opposed to state law at the time of the underlying conviction), that is not the approach that this Court has applied in determining whether a state crime "*is* burglary" for purposes of the definition of "violent

felony" in the adjoining subparagraph, 18 U.S.C. 924(e)(2)(B) (emphasis added).

In construing ACCA's definition of "violent felony," this Court has considered the time of the underlying conviction, not the time of the federal sentencing to which ACCA may apply. Thus, in *Taylor* v. *United States*, 495 U.S. 575 (1990), the question was whether the petitioner's 1963 and 1971 convictions for second-degree burglary under Missouri law were for "any crime punishable by imprisonment for a term exceeding one year * * * that * * * is burglary," 18 U.S.C. 924(e)(2)(B). Notwithstanding the present-tense verb, the Court held that whether a prior offense "is burglary" depends on the "statutory definition of the prior offense" that was in effect at the time of Taylor's earlier convictions. *Taylor*, 495 U.S. at 602. Accordingly, it remanded for a determination of which "former Missouri statutes defining second-degree burglary * * * were the bases for Taylor's prior convictions." *Ibid.* Similarly, in *James* v. *United States*, 550 U.S. 192 (2007), this Court evaluated ACCA's applicability to the versions of Florida's burglary and criminal attempt statutes that were in effect "at the time of James' [state-law] conviction." *Id.* at 197; see also *id.* at 196 (noting that James had been convicted under state-law definitions in effect in 1993).

The appearance of the same present-tense verb ("is") in the immediately adjacent provision, and this Court's interpretation of it as referring to the time of the underlying conviction, counsel strongly against petitioner's reading of Section 924(e)(2)(A)(ii). See, *e.g.*, *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2301 (2009) ("Where, as here, Congress uses similar statutory language * * * in two

adjoining provisions, it normally intends similar interpretations.").

b. Moreover, petitioner's textual argument would not apply to determining whether a prior violent offense carries the requisite sentence to qualify under the penalty component of ACCA's "violent felony" definition, because that definition does not use the present-tense verb "is." Instead, it refers to "any crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. 924(e)(2)(B), without using any verb. The natural time to refer to in deciding the felony status of an offense underlying a "previous conviction" (18 U.S.C. 924(e)(1)) is the time when that conviction was entered, and petitioner can point to nothing in the text to rebut that inference. But petitioner does not suggest why Congress would have wanted to look to the time of the prior conviction to determine the punishment associated with a potential "violent felony," but to the time of the ACCA sentencing proceeding to determine the penalty associated with a potential "serious drug offense."

The statutory history suggests that Congress did not intend a different result by using the phrase "is prescribed" in ACCA's definition of "serious drug offense," compared to the unadorned word "punishable" in the definition of "violent felony." Before Congress expanded ACCA's predicate offenses to include "serious drug offense[s] and violent felon[ies]," ACCA applied to persons who had "three previous convictions * * * for robbery or burglary," and those two categories of convictions were both defined by reference to "any crime *punishable* by a term of imprisonment exceeding one year." Firearm Owners' Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 458 (1986) (emphasis added). Nothing in the addition of "serious drug offense[s]" to

the list of predicate ACCA offenses suggests a different temporal focus on the issue of the prior offense's degree of punishment.

The legislative history supports the conclusion that Congress intended only to expand the scope of ACCA's predicate offenses to include serious drug crimes and violent felonies other than robbery and burglary. See, *e.g.*, H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986) ("a consensus developed in support of an expansion of the predicate offenses to include serious drug trafficking offenses under both State and Federal law and violent felonies, generally"); see also *Taylor*, 495 U.S. at 587 (quoting same). That legislative history does not evince any expectation that inserting the word "is" would create an unusual, dynamic regime under which a prior conviction's status as a predicate offense could shift whenever the legislature changes the potential sentence for a similar offense committed at a later date (without making that change applicable to prior offenders).

3. Evaluating the maximum penalty as of the time of the prior conviction avoids the serious practical difficulties associated with petitioner's hypothetical inquiry about current-day sentencing and better serves ACCA's purposes

Petitioner describes his proposed rule as one that is "simple to apply" because "a federal sentencing court need only [1] identify the offense of conviction and [2] determine whether current state law prescribes a penalty of ten years or more." Br. 20, 30. Although he contrasts the administrability of his approach with that of the court of appeals (Br. 31), he does not claim that his rule is easier to apply than the one the district court applied here. Nor should he, for his approach invites

difficult conceptual and practical difficulties that do not arise when the sentencing court simply considers *both* the definition of the prior offense *and* the accompanying maximum penalty by reference to the sentence applicable to the earlier conviction.

a. Petitioner's approach presents considerable potential difficulties. As an initial matter, it requires the federal sentencing court to convert the offense of the previous conviction into whatever that offense would have been if it had, hypothetically, been committed at the time of the federal sentencing proceeding, and then determine the current maximum sentence for that offense. Petitioner sidesteps that potential pitfall for purposes of this case by observing (Br. 18) that "[t]he state law defining the [sale-of-cocaine] offenses at issue did not change in the interval between [p]etitioner's state convictions and his federal sentencing."

Petitioner's amici, however, acknowledge the "potential complexity" that would arise whenever a State "had reformulated the offense itself in some respect after the defendant's conviction." NACDL Amicus Br. 15 n.4. Although the amici assert that such complications will be "very rare" and could be "simply" handled by translating the old offense conduct into current terms, *ibid.*, the cases belie that sanguine prediction. The Fifth Circuit, when confronted with Texas's revisions to its drug laws, found that it was "impossible to reclassify [a defendant's] 1989 conviction for delivery of less than 28 grams of cocaine under the current Texas statutory scheme," because it "could fall under 3 separate provisions of the current version of" the statute defining the offense. *United States* v. *Allen*, 282 F.3d 339, 343 (2002). Accordingly, it found itself obliged to "retain the classification of [the defendant's] drug offense under the statute

in effect at the time of his conviction." *Ibid.* Similarly, the Sixth Circuit, which follows the approach proposed by petitioner, abandoned it when construing the definition of a "controlled substance offense" for the Career Offender Guideline (Guidelines §§ 4B1.1, 4B1.2(b)) in the wake of Ohio's 1996 revision of its sentencing regime for drug offenders, which moved from a system based on "unit dose amount" to one based on grams. *Mallett* v. *United States*, 334 F.3d 491, 502 (6th Cir.), cert. denied, 540 U.S. 1133 (2003). The court was unable to "determine how Mallett would now be sentenced under Ohio's revised drug laws," because "the offense for which [he] had been convicted no longer exists and no conversion between the former and amended statutes is facially apparent." *Ibid.* Thus, the court used the sentence that applied to the defendant's "controlled-substance offense as of the time of the state-court conviction." *Id.* at 503.

If such difficulties can arise when a State does something as simple as change its drug-quantity tables, complications will only multiply when a State, for instance, adds a new element to an offense definition. Petitioner's amici forthrightly contend that the addition of a new element to an offense definition—one that was not "necessarily established in the earlier conviction"—would mean that there would not be "any" current offense that could be identified as comparable, which would mean that there would be "no predicate offense under ACCA." NACDL Amicus Br. 15 n.4. Congress, however, based ACCA's enhancement on actual convictions and could not have expected courts to treat those convictions as if they had simply disappeared.

Congress has provided for only a limited number of ways that a prior "conviction" can cease to be a conviction for purposes of the Firearms Chapter of Title 18

(which includes ACCA). See 18 U.S.C. 921(a)(20) ("Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter[.]"). A change in the definition of the elements of an offense (or in the punishment applicable to future offenses) is not among them. See *Custis* v. *United States*, 511 U.S. 485, 491 (1994) ("The provision that a court may not count a conviction 'which has been . . . set aside' creates a clear negative implication that courts *may* count a conviction that has *not* been set aside.").[9] Cf. *Lewis* v. *United States*, 445 U.S. 55, 60, 61 n.5 (1980) (holding, in the context of a statutory predecessor to Section 922(g)(1), that "a felony conviction imposes a firearm disability" which "should cease only when the conviction upon which that status depends has been vacated," and therefore the disability applied "while a felony conviction was pending on appeal," even if it was later reversed). Under petitioner's approach, if a State decided to legalize certain drugs and decriminalize their use and distribution, there could be no "maximum term of imprisonment" for former offenses involving those drugs. Accordingly, "previous convictions" for those offenses would vanish for ACCA purposes—even if the State had deliberately preserved those prior convictions as a matter of state law under a savings statute analogous to 1 U.S.C. 109. It seems unlikely that Congress intended such an oddity.

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[9] Although *Custis* expressly decided the issue only with respect to convictions that satisfy ACCA's "violent felony" definition, see 511 U.S. at 491, the language in Section 921(a)(20) is broad enough to extend to all convictions relevant to Section 924(e), and there is no reason to think Congress intended pardons and expungements to extinguish, for ACCA purposes, violent felonies but not serious drug offenses.

In addition, because petitioner's reading allows ACCA's applicability to depend on the happenstance of the timing of the federal sentencing proceeding (rather than the timing of the defendant's state and federal criminal offenses), it could produce arbitrary results. Because of different docket pressures, the availability of defense counsel, and other reasons, the timing of sentencing may vary considerably from district to district and case to case. While some variation is inevitable, it would be troubling if two defendants who each violated Section 922(g) on the same day and who each had an identical criminal history (down to the dates on which they committed each of their prior offenses) could receive substantially different federal sentences solely because one of them happened to be sentenced for his Section 922(g) offense after the State legislature had—long after the predicate offenses were committed—amended the maximum punishment in a way that applied only to crimes committed at later dates.[10]

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[10] Petitioner makes a superficially similar point. He claims (Br. 31) that it would be "arbitrary" to distinguish between "[t]he unfortunate defendant who commits [an] offense one day prior to the state law's effective date," and another defendant who "commits the same crime one day later." There is, however, a critical difference between those two defendants, because the legislature changed the punishment after the first one acted and before the second one did. Whether the penalty for an offense goes up or down on such an occasion, it is very often the case that each defendant is subjected to the punishment that was applicable at the time of his offense, not the amended penalty. See, *e.g.*, *Warden* v. *Marrero*, 417 U.S. 653, 661 (1974) (noting that the federal savings statute, 1 U.S.C. 109, "has been held to bar application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense"). In light of that long-established and rational practice, there is no merit to petitioner's suggestion (Br. 32 & n.7) that "serious equal protection [and due process]

b. The government's reading avoids all of the foregoing difficulties and inconsistencies because it does not require the court to translate prior offense conduct into current-day terms; it permits a defendant to know even before he commits his Section 922(g) offense whether he "has three previous convictions" that would trigger an ACCA enhancement; and it does not allow a defendant's statutory maximum and minimum sentences to fluctuate depending on the date of his federal sentencing. Similarly, to the extent that ACCA is intended to have a specific-deterrence effect on a class of felons with prior convictions, relying on the maximum sentences associated with those offenses at the time of their prior convictions would further that purpose. An individual is more likely to know the statutory maximum to which he was actually exposed in a prior prosecution than he is to know how long the sentence might "now" be for somebody who committed the same offense at a more recent time.

Petitioner's claims of other purported difficulties presented by the government's approach rest on unwarranted assumptions.

Petitioner suggests (Br. 32-33), for instance, that it might be difficult to determine when a prior offense occurred because that fact "is not always apparent on the face of the conviction" and "in all likelihood will not have been litigated at the state level." Petitioner's speculation about the difficulty of determining the time of the prior offense is misplaced because—wholly apart from the question of calculating the maximum term of imprisonment associated with a prior offense—ACCA requires

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concerns" arise when a legislature changes the punishment for an offense solely on the basis of when that offense was committed.

the sentencing court to determine whether the defendant's "three previous convictions" were "committed on occasions different from one another." 18 U.S.C. 924(e)(1). It is difficult to imagine how such a determination could be made without knowing *when* the prior offenses were committed. Similarly, this Court has consistently assumed that courts will look to the "statutory elements" of an offense to determine whether an earlier conviction qualifies as a violent felony under ACCA. See *Shepard* v. *United States*, 544 U.S. 13, 16 (2005) (describing *Taylor*, *supra*). That inquiry necessarily presumes an ability to determine which statutory regime was in effect at the time of the offense, which again depends on knowing when the offense occurred.[11]

c. The administrability of the government's approach is also confirmed by *Rodriquez*, where the Court expressly rejected arguments that it might "often be difficult to determine whether a defendant faced the possibility of a recidivist enhancement in connection

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[11] Petitioner suggests (Br. 33) that the need to determine at sentencing when a prior offense occurred might present a Sixth Amendment problem in light of *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), but lower courts have not found any Sixth Amendment problems in judges' applying ACCA's different-occasions requirement. See, *e.g.*, *United States* v. *Wilson*, 406 F.3d 1074, 1075 (8th Cir.), cert. denied, 546 U.S. 917 (2005); *United States* v. *Burgin*, 388 F.3d 177, 186 (6th Cir. 2004), cert. denied, 544 U.S. 936 (2005); *United States* v. *Morris*, 293 F.3d 1010, 1013 (7th Cir.), cert. denied, 537 U.S. 987 (2002); *United States* v. *Santiago*, 268 F.3d 151, 156-157 (2d Cir. 2001), cert. denied, 535 U.S. 1070 (2002). Cf. *United States* v. *Grisel*, 488 F.3d 844, 847 (9th Cir.) (en banc) (rejecting defendant's "assertion that the dates of his prior convictions are not a part of the 'fact' of his prior convictions. When * * * the face of the document demonstrating [d]efendant's prior conviction includes the date of the offense, the date is just as much a part of the plea as is the nature of the offense described on the face of the document."), cert. denied, 552 U.S. 970 (2007).

with a past state drug conviction." 553 U.S. at 388. As the Court explained, such problems were "greatly exaggerate[d]," because the sentencing court would often be able to determine that fact from "the length of the sentence imposed" in the earlier proceeding; from the judgment of conviction, which "will sometimes list the maximum possible sentence"; or from "the plea colloquy," which "will very often include a statement by the trial judge regarding the maximum penalty." *Id.* at 388-389.[12] To the extent that the Court thought that it would be appropriate to rely on such documents to infer whether a defendant was exposed to a recidivist enhancement, it follows *a fortiori* that they could suffice to establish the maximum penalty associated with the offense.

4. The time of the prior conviction is the reference point for similar inquiries in other statutes addressing recidivists

The government's reading is also supported by other federal statutes that impose restrictions upon or alter punishments for individuals who have prior felony convictions. With few exceptions, such provisions are typically phrased like ACCA's definition of "violent felony," referring to an offense or crime "punishable by imprisonment for" a term exceeding one year. *E.g.*, 18 U.S.C. 175b(d)(2)(B), 842(d)(2), 842(*i*)(1), 922(d)(1), 922(g)(1).

---

[12] As the Court noted in *Rodriquez*, 553 U.S. at 389 n.3, North Carolina is among the many States that, like the federal government, require a trial judge accepting a guilty plea to "[i]nform[ ]" the defendant "of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced." N.C. Gen. Stat. § 15A-1022(a)(6) (2009); see also Fed. R. Crim. P. 11(b)(1)(H). Here, petitioner pleaded guilty to his prior drug offenses. J.A. 47-50, 53.

Petitioner does not suggest that those provisions are susceptible to his construction, which is based on the presence of the word "is." A handful of outlier statutes, like ACCA's definition of "serious drug offense," do include the verb "is." But they do not assist petitioner, because they have not been construed as referring to the time of federal sentencing either. See, *e.g.*, 21 U.S.C. 802(44) (defining "felony drug offense" as "an offense that is punishable by imprisonment for more than one year" under federal, state, or foreign drug laws); *United States* v. *McCaney*, 177 Fed. Appx. 704, 709-710 (9th Cir.) ("Nor is there any support for reading § 802's definition of felony drug offense as referring to how the offense is presently punishable, as opposed to the maximum punishment which could be imposed at the time of conviction."), cert. denied, 549 U.S. 1097 (2006).

One particularly telling example is the Federal Three Strikes Law, 18 U.S.C. 3559(c), which provides for mandatory life imprisonment for a defendant who is convicted of a "serious violent felony" if that person has previously been convicted of, *inter alia*, "one or more serious violent felonies and one or more serious drug offenses." 18 U.S.C. 3559(c)(1)(A)(ii). The term "serious drug offense" is defined differently for purposes of Section 3559(c) than it is for ACCA. For purposes of the Three Strikes Law, it is defined as

> (i) an offense that *is punishable* under [21 U.S.C. 841(b)(1)(A) or 848] or [21 U.S.C. 960(b)(1)(A)]; or
>
> (ii) an offense under State law that, had the offense been prosecuted in a court of the United States, *would have been punishable* under [21 U.S.C. 841(b)(1)(A) or 848] or [21 U.S.C. 960(b)(1)(A)].

18 U.S.C. 3559(c)(2)(H) (emphases added). The amici supporting petitioner cite the second clause of that definition (the one that asks whether state-law offenses "would have been punishable" had they been prosecuted under specified federal statutes) as evidence that Congress knows how to "make[] clear its intention to look back to the time of the prior offense." NACDL Amicus Br. 11. But the first clause of the definition (referring to federal offenses) applies to "an offense that *is punishable*" under the same specified federal statutes (emphasis added). Petitioner and his amici would presumably read the present tense of "is punishable" as referring to the time of the Three Strikes sentencing proceeding. But it would be highly anomalous to measure the seriousness of prior *federal* drug offenses in the present and that of *state* drug offenses in the past. Recognizing that both provisions, despite the use of the term "is" in one of them, refer to the time of the earlier conviction—as the government urges for purposes of ACCA's own definition of serious drug offense—would unify the two portions of the Three Strikes definition. Cf. *United States* v. *Romero*, 122 F.3d 1334, 1342 (10th Cir. 1997) ("In determining whether a felony satisfies the ten-year maximum penalty requirement" of the Three Strikes Law's definition of "serious violent felony," the relevant inquiry is "the penalty at the time of the conviction, not in 1994 when Congress enacted the Three Strikes Law."), cert. denied, 523 U.S. 1025 (1998).

In the state and federal cases that appear to have addressed a similar question, courts have construed definitions in recidivist statutes that use the word "is" (to describe the relevant punishment threshold that a prior offense must cross) to refer to the time of the earlier conviction rather than the second proceeding. Thus, in

State v. *Vainio*, 466 A.2d 471 (1983), cert. denied, 467 U.S. 1204 (1984), the Supreme Judicial Court of Maine construed a state statute prohibiting gun possession by any person "who has been convicted of any crime * * * which *is punishable* by one year or more imprisonment." *Id.* at 473 (emphasis added). It held the "natural import" of the provision to refer to "crimes which *at the time of their commission in the jurisdiction where committed* carried the potential punishment by one year or more imprisonment." *Id.* at 474.

Similarly, in *United States* v. *McGlory*, 968 F.2d 309, cert. denied, 506 U.S. 956, and 506 U.S. 1009 (1992), and 507 U.S. 962 (1993), the Third Circuit construed an earlier definition of "felony drug offense," which referred to a drug offense "that is a felony * * * under any law of a State," 21 U.S.C. 841(b)(1)(A) (1988). The court held that an offense qualified if it was a felony as of the time of the defendant's December 1971 conviction, even though "if he were convicted of the same conduct today, that conduct would only amount to a misdemeanor conviction under Pennsylvania law." 968 F.2d at 348-350.[13]

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[13] It has long been the case that, for purposes of most state habitual-offender statutes triggered by an earlier felony conviction, the predicate offense's status as a felony was typically evaluated as of the time of the predicate conviction, not the time of the subsequent offense or prosecution. See R.P. Davis, Annotation, *Determination of Character of Former Crime as a Felony, So as To Warrant Punishment of an Accused as a Second Offender*, 19 A.L.R. 2d 227, 235 (1951) ("The cases agree on the point that the fact that the previous conviction of an offense which at the time of such conviction was a felony * * * will not preclude its subsequent use under such statutes to enhance the punishment of one subsequently convicted of a felony, even though prior to the commission of the subsequent offense the prior offense was reduced from the grade of felony to misdemeanor.").

B. Even If The Maximum Penalty Associated With A Prior Conviction Should Be Determined As Of The Time Of The ACCA Proceeding, The Nonretroactive Nature Of Intervening Changes In State Law Should Be Taken Into Account

Even assuming that the relevant time for determining the "maximum term of imprisonment" associated with an individual's prior convictions is the time of the Section 922(g) prosecution at which an ACCA sentence enhancement might be imposed, petitioner cannot prevail unless the maximum penalty under "current state law" should be determined without regard to whether current law "applies retroactively to the date the defendant committed the state offense," Pet. Br. 15 (capitalization modified). To that end, petitioner makes three arguments that are inconsistent but ultimately irrelevant, because they do not address the only question that matters under ACCA. The sole relevant question is *what* the "maximum term of imprisonment * * * prescribed by [state] law" for the defendant's prior offense actually is—not *why* the State decided to change a maximum sentence without making that change applicable to previously committed offenses (like petitioner's).

Petitioner's attempt to divine the motivations for North Carolina's shift to a structured sentencing regime and its decision to make that regime applicable only to new offenses bears no relation to the text of ACCA. Congress has specified that the seriousness of a defendant's drug offense is to be judged by whether it carries "a maximum term of imprisonment of ten years or more." In relying on that measure, "Congress chose to defer to the state lawmakers' judgment." *Rodriquez*, 553 U.S. at 388. That approach will undoubtedly reflect fluctuations over time in the degree of seriousness at-

tached to particular offense conduct, as state legislators make different policy judgments. But Congress did not intend that federal courts would look behind those state judgments or inquire whether the old or new sentencing regime better reflects the State's "normative judgment" (Pet. Br. 21). Rather, if a sentencing regime remains applicable to a defendant, the maximum sentence for his offense under that regime determines ACCA's coverage.

1. Petitioner first contends (Br. 22) that a State's decision about whether to make a sentencing law retroactive "is wholly unrelated to the State's view of the seriousness of the offense," because there are usually reasons other than the offense's perceived seriousness that counsel against making a change retroactive. While that may be true, it does not change the reality that the intervening changes in the law on which petitioner wants to rely are inapplicable to the "serious drug offense[s]" that he "committed on occasions different from one another" in 1991, 1992, and 1994. 18 U.S.C. 924(e)(1).[14]

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[14] Echoing the Second Circuit's discussion in *Darden*, petitioner contends that "a retroactivity determination is remedial in nature" and does not concern "the temporal scope of the [underlying] legal right." Br. 23-24 (citing *Darden*, 539 F.3d at 127-128). That proposition, however, derives entirely from the discussion in *Danforth* v. *Minnesota*, 552 U.S. 264 (2008), which has no relevance here. Although *Danforth* contains statements that tie retroactivity to "the availability or nonavailability of remedies," those statements arose in the context of "[this Court's] jurisprudence concerning the 'retroactivity' of 'new rules' *of constitutional law*." *Id.* at 290-291 (emphasis added). Constitutional rules originate from "the Constitution itself, not [from] any judicial power to create new rules of law," which means that they "necessarily pre-exist[] [this Court's] articulation" of them. *Id.* at 271. That constitutional paradigm, however, is irrelevant to the question of whether North Carolina's new sentencing regime should be retroactive. Neither petitioner nor any other offender had a "necessarily pre-exist[ing]" right (*id.* at 271) to be sentenced according to the Structured Sentenc-

2. Petitioner next contends (Br. 26-28) that the prospective changes to maximum sentences introduced by North Carolina's structured sentencing regime do not reflect a judgment that earlier offenses were "categorically more serious" than later ones. Whether or not that is so, it does not change the inquiry for offenses to which the structured sentencing regime does *not* apply. ACCA does not invite a court to ask anything other than what sentence "is prescribed by law" for the prior offenses in question. If the "current" sentencing regime does not apply to offenses that were committed before it became effective, then it does not reduce the relevant maximum term of imprisonment.

3. Finally, petitioner suggests (Br. 29-30) it is "[i]mportant[]" that "North Carolina makes the state's current law the measure of an offense's seriousness when that offense is considered for recidivist purposes" (by assigning point levels to prior convictions for calculating the "prior record level" on the horizontal axis of the felony punishment chart). While Congress accepted state judgments about maximum punishments as the measure of an offense's seriousness, *Rodriquez*, 553 U.S. at 388, it did not incorporate state-law viewpoints on how prior convictions are to be treated under state recidivism statutes. ACCA reflects a federal judgment about recidivism, *i.e.*, "the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun." *Begay* v. *United States*, 553 U.S. 137, 146 (2008). The manner in which North Carolina treats

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ing Act before it went into effect. That Act was indisputably a creature of the state legislature, which had the correlative power to create rules about its retroactive application (subject to the limits imposed by the Ex Post Facto Clause applicable to the States, U.S. Const. Art. I, § 10, Cl. 1).

its convictions for recidivism purposes is irrelevant in applying ACCA.

The irrelevance of North Carolina's own recidivism calculations is demonstrated by two disparities between their operation and effect under state law and the result petitioner urges under ACCA. First, the North Carolina statute requires the prior offense to be classified as of the date of the current offense, not the date of the recidivist sentencing proceeding that petitioner contends should be used under ACCA. See N.C. Gen. Stat. § 15A-1340.14(c) (2009) ("[T]he classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed."). Second, under the structured sentencing regime, the effects of intervening reclassifications of North Carolina felonies are far less significant than the one that petitioner seeks under ACCA. The State uses current felony classifications when counting points associated with prior record offenses (the point total plays a role that is roughly analogous to a defendant's criminal history category under the federal sentencing guidelines). But even with respect to those prior offenses, most felony reclassifications have *increased*, not decreased, their severity, and usually by only one or two levels. No reclassification has had the effect (as petitioner seeks here) of having the maximum sentence associated with a prior offense drop from ten years to 38 months.[15]

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[15] Out of 48 felony reclassifications identified on the current felony-classification chart, only one of them decreased the severity of the classification ("Statements under oath," a Class I felony, was previously part of "Perjury," a Class F felony). And only three offenses were made more severe by more than two levels (manufacture of methamphetamine; violations of sex-offender-registration obligations; and a

C. In This Case, The Maximum Sentences For Petitioner's Previous Cocaine Offenses Were At Least Ten Years, Whether They Are Judged As Of The Time Of Those Convictions Or As Of The Time Of His Federal Proceeding

1. Petitioner concedes, as he must, that at the time of his prior convictions in 1992 and 1995, the maximum term of imprisonment for his offenses was ten years. Br. 7; see also p. 4, *supra*. Indeed, petitioner actually received ten-year sentences. See p. 22 & note 8, *supra*. Although North Carolina later reduced the maximum penalties associated with similar offenses if they were committed on later dates, it has not made those changes retroactive to offenses (such as petitioner's) that were committed before October 1, 1994. See N.C. Gen. Stat. § 15A-1340.10 (2009). Thus, even if petitioner were to be sentenced by a state court today for his prior convictions, he would still be subject to a maximum term of imprisonment of at least ten years.

Accordingly, petitioner cannot prevail unless this Court accepts both of his contentions and decides that the maximum term of imprisonment for purposes of Section 924(e)(2)(A)(ii) needs to be determined as if his prior offense had not been committed until the time of his federal sentencing. The Court should decline that invitation to engage in a hypothetical inquiry so

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second or subsequent offense of stalking). The great majority of the reclassifications have been one- or two-level *increases* in severity. See North Carolina Sentencing & Policy Advisory Comm'n, *Structured Sentencing: Training and Reference Manual*, Supp. 2, at 3, 6, 24 (2010), http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/App-f10.pdf. The cited examples omit misdemeanors that have been reclassified as felonies (which also result in more severe treatment for criminal-history purposes, and thus have an effect that is the opposite of what petitioner seeks).

divorced from the circumstances of petitioner's actual prior convictions and associated sentence exposure. Cf. *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2586-2588 (2010) (rejecting a "hypothetical approach" to determining whether an alien had been convicted of crime for which the maximum term of imprisonment is more than one year).

2. Despite petitioner's cursory suggestion to the contrary (Br. 30), principles of lenity provide no basis for a different conclusion. Resort to those principles is appropriate only when there is a "grievous ambiguity" in the statutory text, such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended," *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted), and "the equipoise of competing reasons cannot otherwise be resolved," *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000). That is not the case here. In light of the context and structure of ACCA (as well as other federal recidivism provisions), petitioner's reading of Section 924(e)(2)(A)(ii) is not in "equipoise" with the approach of either the district court or the court of appeals in this case.

In any event, adopting petitioner's reading would not effectuate the underlying purposes of the rule of lenity. To the extent it is intended to assure that a criminal defendant has "fair warning * * * of what the law intends to do if a certain line is passed," *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931), petitioner's reading of ACCA is uniquely unsuited to provide such warning, because it makes it impossible to know what the statutory minimum and maximum punishments for a Section 922(g) offense will be until long after the offense

is completed. In addition, as a practical matter, it is reasonable to assume that a convicted felon—even one who is familiar with ACCA—is more likely to know what his maximum potential sentence for a state-law offense was at the time of his former conviction than to know how the legislature (perhaps in a State where he no longer resides) may since have changed the sentence for individuals who committed such an offense at a later date. Similarly, there is little reason to believe that petitioner's reading would generally benefit, as opposed to harm, criminal defendants. Legislatures are at least as likely to increase as to decrease the maximum terms of imprisonment associated with particular crimes.[16] Because petitioner's reading would often work against Section 922(g) defendants, principles of lenity are inapplicable. See *United States* v. *O'Neil*, 11 F.3d 292, 301 n.10 (1st Cir. 1993) (declining to invoke lenity because "[d]epending on the facts of any particular defendant's situation, a generous reading of the [statutory] provision can produce either a harsher or a more lenient result than a cramped reading will produce"); *McGlory*, 968 F.2d at 355-356 (Becker, J., concurring) (finding present-tense verb in a recidivism statute to be ambiguous but refusing to adopt the defendant's interpretation because it "is not necessarily more lenient to the entire class of affected criminal defendants").[17]

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[16] Since the shift to structured sentencing (which petitioner characterizes as having been "essentially punishment neutral," Br. 28), the great majority of North Carolina's reclassifications of felonies have made them more rather than less severe. See note 15, *supra* (describing reclassifications shown on current felony-classification chart).

[17] Even if the Ex Post Facto Clause applicable to Congress (U.S. Const. Art. I, § 9, Cl. 3) would prevent a defendant from becoming newly eligible for an ACCA sentence enhancement as a result of changes in

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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the law that occurred after he committed the Section 922(g) violation. it would not do so for changes in the law—such as those in this case—that occurred before the federal offense. Moreover, there is no evidence that Congress intended for ACCA to incorporate the one-way, defendant-friendly ratchet that petitioner's time-of-federal-sentencing rule would produce for changes in state-law maximums that occur between the Section 922(g) offense and the federal sentencing for that offense.

APPENDIX

1. 18 U.S.C. 921 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include—

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess or receive firearms.

* * * * *

2. 18 U.S.C. 922 provides in pertinent part:

Unlawful acts

* * * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * * *

3. 18 U.S.C. 924 provides in pertinent part:

Penalties

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *

REPLY BRIEF

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IN THE

Supreme Court of the United States

CLIFTON TERELLE MCNEILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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ARGUMENT

I. THE TEXT OF ACCA DOES NOT SUPPORT THE GOVERNMENT'S READING OF THE "SERIOUS DRUG OFFENSE" DEFINITION.

The government does not dispute that in the Armed Career Criminal Act, Congress defined a "serious drug offense" by using the present tense. U.S. Br. 11, 17. The statute's plain meaning thus provides no support for the government's contention, made here for the first time, that "[t]he relevant time for evaluating the 'maximum term of imprisonment' associated with a defendant's conviction for a potential predicate offense is the time of the sentencing for that conviction." U.S. Br. 17. The government does not argue that its reading of 18 U.S.C. § 924(e)(2)(A)(ii) derives from the language of the text. Instead, the government invites this Court to construe the "serious drug offense" definition on the basis of the statute's context and structure. For the following reasons, this Court should decline the government's invitation.

A. The "Serious Drug Offense" Definition Has A Plain Meaning.

1. "Is prescribed" means that current state law provides the standard for determining the maximum imprisonment term for an offense.

A "cardinal cannon" of statutory construction demands that "courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). In the Armed Career Criminal Act (ACCA), Congress defined a "serious drug offense," in relevant part, as one for

which a maximum term of imprisonment of ten years or more "is prescribed" by state law. 18 U.S.C. § 924(e)(2)(A)(ii). By employing the present tense, Congress required that a sentencing court look to the penalty a state currently prescribes for an offense, irrespective of the punishment in effect at the time of the defendant's state conviction. It is worth noting that none of the four circuit courts of appeal that have addressed the "serious drug offense" definition—even the two circuits that reject Petitioner's position in this case—has taken the government's novel position that ACCA speaks to the penalty in place at the time of the defendant's state crime. See *United States* v. *McNeill*, 598 F.3d 161, 165 (4th Cir. 2010); *United States* v. *Darden*, 539 F.3d 116, 121 (2d Cir. 2008); *United States* v. *Hinojosa*, 349 F.3d 200, 205 (5th Cir. 2003); *United States* v. *Morton*, 17 F.3d 911, 915 (6th Cir. 1994). No court has aligned with the government because the meaning of the phrase "is prescribed by law" is obvious.

"Congress' use of a verb tense is significant in construing statutes," *United States* v. *Wilson*, 503 U.S. 329, 333 (1992), especially in the criminal provisions addressing firearm violations, *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 116 (1983). This Court emphasized in *Dickerson* that Congress, through its use of verb tense, "carefully distinguished between present status and a past event" for purposes of 18 U.S.C. § 922(g)(1), the statute prohibiting convicted felons from possessing firearms. *Id.* Congress' use of the present tense to specify the penalty provided for a serious drug offense is no less significant in § 924(e)(2)(A)(ii).

The government simply does not address this Court's plain meaning jurisprudence. Instead, it

argues that ACCA's context and structure support its reading, even though the starting point and touchstone of any analysis is a statute's language. *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Here, the government has failed to advance any argument that the ordinary meaning of the words used in § 924(e)(2)(A)(ii) is so unclear that resort to other modes of statutory interpretation is required. See *id.* (stating, "Absent a clearly expressed legislative intention to the contrary, th[e] language must ordinarily be regarded as conclusive").

2. Under its plain meaning, a "serious drug offense" for ACCA purposes is a generic offense and not an individual defendant's crime.

ACCA requires sentencing courts to look to the maximum imprisonment term the law prescribes for "an offense." As this Court clarified in *United States* v. *Rodriquez*, "an offense" means "a violation of" state law. 553 U.S. 377, 382-83 (2008) Accordingly, a "serious drug offense" determination is a categorical, and not a defendant-specific, inquiry. *Id.* at 393; see also, *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2587 n.11 (2010); *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2300 (2009) (noting that ACCA requires a "categorical" and not a "circumstance-specific" approach).

In its discussion, the government paraphrases § 924(e)(2)(A)(ii) as providing for "the 'maximum term of imprisonment' associated with a defendant's conviction for a potential predicate offense." U.S. Br. 17. In truth, the "serious drug offense" definition does not address "a defendant's conviction"; rather, it addresses "an offense." The difference matters.

The government's reference to "a defendant's conviction for a potential predicate offense" suggests that determining the penalty prescribed for "an offense" is the same as determining the maximum penalty a particular defendant faced. In fact, factors such as offense date are particular only to the individual defendant. Such factors are not components of the generic offense, and they do not contribute to offense "seriousness" within the meaning of ACCA's "serious drug offense" definition. Although the date a defendant commits the offense might ultimately affect the length of that person's sentence, it is not, consistent with *Rodriquez*, part of the "maximum term" of imprisonment for the "offense." See 553 U.S. at 393 (contrasting provision that "clearly focuses on the circumstances of the particular [defendant]" from ACCA's focus on "the offense").[1]

That Petitioner received a ten-year sentence under North Carolina's former sentencing laws is irrelevant to the question of whether his prior convictions are for "serious drug offenses" within the meaning of ACCA. It would indeed be "hard to accept the proposition that a defendant may lawfully be sentenced to a term of imprisonment that exceeds the 'maximum term of imprisonment . . . prescribed by law,'" U.S. Br. 15 (internal punctuation and citation omitted), but that is not what happened in Petitioner's case. Petitioner was not sentenced in

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1 Looking to the generic offense is further bolstered by ACCA's use of the phrase "for which" that links the maximum imprisonment term to the offense. The relevant question that the statute asks is, "What is the maximum imprisonment term prescribed by state law *for* the *offense* of conviction, *i.e.* the 'violation of' state law?" *See Rodriquez*, 553 U.S. at 383.

accordance with the penalties that North Carolina law currently "prescribes" for the *offenses* he committed. Rather, he received "the maximum term of imprisonment" that the state prescribed in the 1990s, when Petitioner sustained his convictions. That fact does not inform the penalty North Carolina "prescribes" for those offenses now. See *Carachuri-Rosendo*, 130 S. Ct. at 2582 ("Despite the fact that the *Lopez* petitioner had been punished as a felon under state law–and, indeed, received a 5-year sentence–the conduct of his offense was not punishable as a felony under federal law, and this prevented the state conviction from qualifying as an aggravated felony for immigration law purposes.") (citing *Lopez* v. *Gonzalez*, 549 U.S. 47, 55 (2006)).

In *Rodriquez*, the defendant's convictions categorically qualified because the offense of conviction included a recidivist enhancement that set the maximum imprisonment term at ten years. 553 U.S. at 393. Here, current North Carolina law prescribes a maximum of thirty-eight months' imprisonment for Petitioner's crimes, even with every possible recidivist enhancement applied. See N.C. Gen. Stat. §§ 15A-1340.17(c)-(d) (setting thirty-one months as the highest aggravated minimum term and thirty-eight months as the corresponding highest maximum for a Class G offense at the highest criminal history category). Petitioner's prior offenses, categorically, are not "serious drug offenses" under ACCA.

B. ACCA Focuses On The Defendant's Federal Firearm Offense, Not On The Defendant's Prior State Convictions.

ACCA addresses the defendant's violation of 18 U.S.C. § 922(g)(1); it does not punish the defendant's prior convictions or status as a recidivist. See

Rodriquez, 553 U.S. at 385-86 (noting, "This Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant") (internal quotations and citations omitted).[2] Section 924(e) focuses on the instant federal offense by use of the present tense to describe the two components that must exist in order to impose ACCA's penalties. Under the statute, an armed career criminal is "a person who ***violates*** section 922(g) . . . and ***has*** three previous [qualifying] convictions . . . " § 924(e)(1) (emphasis added). The present-tense verbs indicate the "previous convictions" must qualify as ACCA predicates at the time of the present federal firearms violation. See, *e.g.*, *United States* v. *Pressley*, 359 F.3d 347, 350 (4th Cir. 2004) (stating, "[T]he plain text dictates [the § 922(g)] violation serves as the event which the 'previous convictions' must precede."). Had Congress intended to place the ACCA determination in the past, it could have used the present perfect tense, as it did in § 922(g)(1), which applies to "any person . . . who ***has been convicted*** in any court of a crime

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2 The government relies heavily on the fact that this Court occasionally used the past tense when referring to the prescribed imprisonment term that applied in *Rodriquez*. U.S. Br. 21-23 (citing *Rodriquez*, 553 U.S. at 381-83). However, *Rodriquez* did not address the temporal issue presented here. Rather, this Court considered whether Washington's recidivist law formed part of the "relevant law" that determined the maximum imprisonment term for an offense. *Rodriquez*, 553 U.S. at 381-83. Indeed, the issue presented here could not have existed in *Rodriquez*, because Washington had not altered that recidivist law since its enactment in 1971. See *In re Cruz*, 134 P.3d 1166, 1168 (Wash. 2006) ("The substance and wording of the [recidivism] statute is the same today as it was in 1971").

punishable by imprisonment for a term exceeding one year." (emphasis added).[3]

Put another way, the overall context of ACCA makes it clear that the status of a state conviction as an ACCA predicate is not frozen at the time the conviction is sustained. Subsequent events can transform a prior conviction from one that qualifies as an ACCA predicate to one that does not. For example, a conviction which has been expunged, set aside or for which the defendant has been pardoned cannot be used as an ACCA predicate. 18 U.S.C. § 921(a)(20). Accordingly, whether a particular conviction qualifies as an ACCA predicate can only be determined as of the date of the federal sentencing. Petitioner's assertion that the penalty for a "serious drug offense" must be determined based on a state's current sentencing law is thus wholly consistent with ACCA's directive that the predicate status of prior convictions be determined as of the time of the

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3 Two of the appellate-court cases the government relies upon to support its reading of § 924(e)(2)(A)(ii) interpreted other statutes and looked at the use of the present perfect tense in those statutes. See *United States* v. *Romero*, 122 F.3d 1334, 1342 (10th Cir. 1997) (explaining that use of the phrase "has been convicted" in 18 U.S.C. § 3559(c), the federal three strikes law, "clearly indicate[d] the time of conviction" provided the relevant point in time); *United States* v. *McGlory*, 968 F.2d 309, 349-50 (3d Cir. 1992) (applying plain meaning of phrase "after two or more convictions for a felony drug offense have become final," 21 U.S.C. § 841(b)(1)(A), to conclude felony status of a prior conviction is evaluated at the time of that conviction); see U.S. Br. 34-35.

federal proceedings, not at the time they were originally sustained.

This is also consistent with the idea that "100% of the [ACCA] punishment" is for the federal firearm offense and none is for the predicate offenses. *Rodriquez*, 553 U.S. at 386. Given ACCA's evident intent to punish those who possess a firearm after committing three serious offenses, it makes sense to predicate that very harsh punishment on convictions that are viewed as serious at the time of the federal offense, rather than on convictions which were once viewed as serious but now no longer are. A reading which irrevocably fixes the seriousness of a prior conviction at the time it is sustained is thus contrary to ACCA's structure and purpose.

C. The Government's Contextual Argument Conflates The "Violent Felony" And "Serious Drug Offense" Standards.

The government contends ACCA's "context" and "overall structure" demonstrate that the penalty in effect at the time of the defendant's state conviction should be used to define a "serious drug offense." U.S. Br. 18, 23. Specifically, the government asserts that because this Court "has considered the time of the underlying conviction" to decide whether an offense "'is burglary' for purposes of the definition of 'violent felony,'" the penalty in effect at the time of the underlying conviction must also govern the determination of a "serious drug offense." U.S. Br. 23-24. The government's argument is wrong, for two reasons. First, contrary to the government's claim, the "violent felony" determination is not wholly backward-looking. Second, even if it were, that fact would not warrant disregarding the present-tense meaning of the "serious drug offense" definition.

1. The "violent felony" determination is not wholly backward-looking.

A "violent felony" determination under ACCA has two distinct components that the government conflates. Identifying the offense, the first component of the determination, necessarily requires looking to the time of the conviction, because the offense, itself, exists only in the past. Identifying, however, whether the offense *is* an ACCA predicate, the second component of the inquiry, requires a court to apply the generic, current, offense definition.

To illustrate, in *Taylor* v. *United States*, this Court adopted a unified federal standard for the violent felony predicate of "burglary." 495 U.S. 575 (1990). *Taylor* looked to a "generic burglary" definition free of the permutations of the various state laws. *Id.* at 599. The question in *Taylor* was whether the defendant's offense constituted a burglary, that is, whether it met the generic definition. The inquiry is present-day: it takes what the defendant did and asks, "Is what the defendant did 'burglary?'"

If the government's construction of the "serious drug offense" definition were applied to violent-felony determinations, it would seem logical to look to the characterization of the crime in effect at the time of the defendant's underlying conviction, but no one would suggest that approach to be valid. For example, no federal court sentencing someone today would say that drunk-driving or failure-to-report-for-service-of-sentence convictions are violent felonies because they were sustained prior to this Court's decisions in *Begay* v. *United States*, 553 U.S. 137 (2008), and *Chambers* v. *United States*, 555 U.S 122 (2009).

2. The "serious drug offense" and "violent felony" provisions have material distinctions.

Even if the government were correct that "violent felony" determinations are past-focused, that fact would not dictate a similar focus for purposes of defining a "serious drug offense." The process of identifying a "serious drug offense" contains an extra step that a violent-felony inquiry does not require.

A "violent felony" consists of its elements, elements that relate to force or to offenses similar in kind to burglary, arson, extortion, or explosives offenses. 18 U.S.C. § 924(e)(2)(B)(ii). The threshold felony-status requirement ("crime punishable by imprisonment for a term exceeding one year," § 924(e)(2)(B)) merely duplicates the definition for a § 922(g)(1) offense. All "violent felonies" qualify as ACCA predicates.

All drug offenses, however, are not "serious." Like a violent felony, a "serious drug offense" must contain certain offense elements (specifically, the "manufacturing, distributing, or possessing with intent to distribute, a controlled substance."). 18 U.S.C. § 924(e)(2)(A)(ii). Once the elements are identified, a violent-felony inquiry is at an end, but a "serious drug offense" inquiry is not. Even if the defendant's drug offense contains the requisite elements, it must also carry a maximum prison sentence of at least ten years. *Id.* Only those drug offenses which meet *both* the elements and penalty prongs are "serious drug offenses" under ACCA. Even if both the "serious drug offense" and "violent felony" provisions require looking to the past offense to identify what the defendant did, there is no reason why the past state penalty for a drug offense must be considered.

The government characterizes § 924(e)(2)(A)(ii) as an "outlier" because, unlike the violent-felony definition, the subsection uses the phrase "maximum term of imprisonment that is prescribed by law," rather than "punishable," to describe the qualifying penalty. U.S. 33-34. The significance, however, is not that the "serious drug offense" definition is an outlier, but that Congress did not intend that it be functionally indistinguishable from the "violent felony" definition. See *United States* v. *Bean*, 537 U.S. 71, 76 n.4 (2002) ("The use of different terms within related statutes generally implies that different meanings were intended") (internal quotations and citation omitted). Thus, even if, *arguendo*, a violent-felony inquiry were entirely retrospective, it does not mean that Congress intended a serious-drug-offense inquiry to be so as well.

II. ACCA BASES THE "SERIOUS DRUG OFFENSE" PREDICATE ON A STATE'S CURRENT VIEW OF SERIOUSNESS.

The government criticizes Petitioner for offering no suggestion as to "why Congress would have wanted to look to the time of the prior conviction to determine the punishment associated with a potential 'violent felony,' but to the time of the ACCA sentencing proceeding to determine the penalty associated with a potential 'serious drug offense.'" U.S. Br. 25. Petitioner submits that there are several compelling reasons for Congress to have chosen this structure.

As noted above, unlike violent felonies, not all drug offenses are "serious" for ACCA purposes. ACCA looks to state law statutory maximums that pertain to drug-trafficking offenses as a proxy for seriousness. Because of the relevance of state penalties, this Court recognizes that between violent felonies and serious drug offenses, state law plays a

more prominent role with respect to the latter. See *Rodriquez*, 553 U.S. at 387 (stating that "the meaning of 'burglary' for purposes of ACCA does not depend on the label attached by the law of a particular [s]tate, [citation omitted], but the 'maximum penalty prescribed by law' for a state offense necessarily depends on state law."). A "serious drug offense" assessment requires a deference to state judgments in a way that a "violent felony" analysis simply does not.

Moreover, the seriousness of a drug offense derives not from its elements, but from the state's view of the seriousness of the offense, codified in the statutory maximum. Because a state's judgment regarding the relative severity of drug offenses can change over time, looking at the state's present view of offense seriousness provides the proper deference to the state's power to define a "serious drug offense."

A. Legislative Judgments Concerning The Seriousness Of Drug Offenses Change Over Time.

In contrast to a violent felony, the elements of which are determined by the defendant's actions at the time of the offense, a drug offense is "serious" because of the maximum term of imprisonment a state sees fit to prescribe for it. A state's judgment regarding the seriousness of drug offenses can change over time, and the government agrees that a state's evolving judgment in this area "undoubtedly reflect[s] fluctuations over time in the degree of seriousness attached to particular offense conduct, as state legislatures make different policy judgments." U.S. Br. 37-38.

Judgments about drug offenses change in ways that opinions about violent crimes simply do not. From

Old Testament times, there has been societal condemnation of the kinds of violent conduct identified by ACCA. The same cannot be said for drug crimes.[4]

For example, changing views of offense seriousness prompted New York's legislature to reform that state's "inordinately harsh" Rockefeller drug laws. See *Darden*, 539 F.3d at 126-27 ("The consistent view of [] state lawmakers was that the Rockefeller drug-sentencing laws were too severe, then as now."). New York's new law "reflected a categorical rejection of the harshness of the Rockefeller sentencing laws" by the state. *Id.* at 127.

The Texas sentencing reform law summarized by the Fifth Circuit in *Hinojosa* drastically reduced the statutory maximum for low-level drug offenses. 349 F.3d at 204. Specifically, the law Texas enacted in 1994, reduced the statutory maximum for delivery of less than one gram of cocaine from ninety-nine to just two years' imprisonment. *Id.* The legislative record indicated the reform law revised the statutory imprisonment terms for "crimes according to their relative severity." Senate Research Center, Bill Analysis of S.B. 1067, 73d Leg., Reg. Sess., at 19 (Tex. 1993).

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4 As Judge Torruella has noted, "[d]rug enforcement policy involves the consideration of issues as diverse as international and national politics, law enforcement, sociology, economics, organizational dynamics, and penology, to mention only the most salient. In addition, there are complex scientific, pharmacological and health questions, and, of course, moral quandaries, raised by the various policy choices and alternatives." Juan R. Torruella, *The "War on Drugs": One Judge's Attempt at a Rational Discussion*, 14 Yale J. on Reg. 235, 238 (1997).

Changing views of drug offenses also occur at the federal level, as evidenced by the recent Fair Sentencing Act (FSA), which Congress enacted, "to restore fairness to Federal cocaine sentencing." See Pub. L. No. 111-220, 124 Stat. 2372 (2010) (Preamble). Congress designed the FSA to ameliorate the 100-to-1 sentencing disparity between powder and crack cocaine offenses that had been enshrined into law by the Anti-Drug Abuse Act of 1986, a disparity that some saw as racially discriminatory. See *Kimbrough* v. *United States*, 552 U.S. 85, 94-100 (2007).

B. The Government's Interpretation Of ACCA Requires Federal Courts To Impose Mandatory Minimum Sentences Based On Repudiated And Outdated Laws.

The foregoing examples demonstrate that legislative views about drug offenses can and do change in ways that views about violent felonies do not. One can reasonably conclude that Congress, having deferred to the states to determine the seriousness of a drug offense, would have intended to use the states' most current understanding of that seriousness before an ACCA sanction is imposed in a federal court.

In contrast, the government's reading of § 924(e)(2)(A)(ii) has the potential to so distort the very idea of a "serious drug offense" that the term ceases to have any real meaning. North Carolina law provides an example. At the time of Petitioner's state drug offenses, state law prescribed a maximum sentence of imprisonment of ten years irrespective of how small the quantity of drugs involved in the trafficking offense. N.C. Gen. Stat. §§ 90-95(a)-(b); § 14-1.1(8). Under the state's current law, possession

with intent to sell or deliver less than twenty-eight grams of cocaine carries a maximum sentence of imprisonment for thirty months, and a maximum of thirty-eight months for a completed sale. §§ 90-95(a)-(b) (classifying possession with intent to distribute as a Class H offense, and sale of a cocaine as a Class G Offense); §§ 15A-1340.17(c)-(d) (statutory imprisonment tables). The government would thus have it that the distribution of, say, one gram of cocaine prior to the enactment of Structured Sentencing be deemed a serious drug offense, but the distribution of twenty-seven grams after its enactment not be. The result is absurd, without any connection to the actual "seriousness" of the offenses at issue.

In addition, the government's approach would force federal courts to sentence defendants based on a view of "seriousness" that a state may have rejected years, or even decades, ago. And, because ACCA imposes a statutory minimum sentence, a federal sentencing court would have no ability to ameliorate, through a downward departure or variance, the effect of using a repudiated sentence. The government does not explain why, in a statute deferring to state judgments, Congress would have intended for ACCA to enshrine a view of seriousness that the state itself no longer holds. It also does not explain why Congress would have wanted to allow the federal government to use outdated state views as the basis for obtaining fifteen-year mandatory minimum sentences.

III. A STATE'S RETROACTIVITY DECISIONS ARE UNRELATED TO ITS ASSESSMENTS OF OFFENSE SERIOUSNESS.

The government argues that even if this Court construes § 924(e)(2)(A)(ii) as requiring use of the

current penalty for determining a "serious drug offense," "[P]etitioner cannot prevail unless the maximum penalty under 'current state law' should be determined without regard to whether the current law applies retroactively to the date the defendant committed the state offense." U.S. Br. 37 (internal punctuation and citation omitted). The government maintains that because North Carolina did not make its Structured Sentencing scheme retroactive, Petitioner would still be subject to ten-year maximum sentences for the drug offenses he committed. U.S. Br. 41. This reading, a mirror of the Fourth Circuit's construction of § 924(e)(2)(A)(ii), has a superficial appeal, but it ignores that not every factor that determines a defendant's individual punishment is relevant to the "maximum term" of imprisonment that "is prescribed" for "an offense" under § 924(e)(2)(A)(ii).

In *Rodriquez*, this Court held that a recidivism enhancement for a second drug offense constituted the "maximum term of imprisonment" under a state statute that provided a lower sentence for first offenders. *Rodriquez*, 553 U.S. at 382-83. The Court reasoned, "an offense committed by a repeat offender is often thought to reflect greater culpability and thus to merit greater punishment." *Id.* at 385. *Rodriquez* thus stands for the proposition that the "maximum term of imprisonment" the "law prescribes" for "an offense" includes those factors, such as recidivism, that are relevant to the seriousness of an offense. *Id.* at 382-83, 385-88. Accordingly, if a particular factor "has no bearing on the seriousness of an offense," *id.* at 385, it is not part of the "maximum term of imprisonment" the law "prescribes" for that "offense."

As Petitioner demonstrated in his opening brief, North Carolina's decision not to make Structured

Sentencing retroactive did not speak to the state's view about the seriousness of criminal offenses.[5] Pet. Br. 20-29. Use of the kind of general savings clause North Carolina employed is a purely administrative, ministerial decision. It makes the offense date *the* critical factor in determining a defendant's punishment, true, but that date has no bearing on whether the offense is serious. It cannot be overemphasized that a crime committed by someone on Monday is not more serious than the same crime committed by someone else on Wednesday.

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5 The government appears to concede that retroactivity is unrelated to seriousness. In its brief, the government writes that "Petitioner first contends (Br. 22) that a State's decision about whether to make a sentencing law retroactive 'is wholly unrelated to the State's view of the seriousness of the offense,' because there are usually reasons other than the offense's perceived seriousness that counsel against making a change retroactive. *While that may be true,* it does not change the reality that the intervening changes in the law on which petitioner wants to rely are inapplicable to the 'serious drug offense[s]' that he 'committed on occasions different from one another in 1991, 1992, and 1994." U.S. Br. 38 (emphasis added; citation omitted).

IV. USING A STATE'S CURRENT LAW TO MAKE THE "SERIOUS DRUG OFFENSE" DETERMINATION IS SIMPLER, CONSISTENT WITH ACCA'S PLAIN LANGUAGE AND PURPOSE, AND IS MORE EQUITABLE THAN THE GOVERNMENT'S RETROACTIVITY-BASED APPROACH.

A. The Government's Approach Suffers The Same Infirmities Inherent In The Fourth Circuit's Rule.

The government asserts that "[a]lthough [Petitioner] contrasts the administrability of his approach with that of the court of appeals . . ., he does not claim that his rule is easier to apply than the one the district court applied here." U.S. Br. 26. The government, however, advocates for a construction of the "serious drug offense" definition that is identical in all meaningful respects to that of the Fourth Circuit, not the district court. Consequently, every deficiency in the Court of Appeals' approach that Petitioner identified in his initial brief is equally applicable to the government's reading of § 924(e)(2)(A)(ii). Pet. Br. 31-35.

The government, in footnote 5 of its brief, states that "if a State subsequently lowered the maximum penalty and made that reduction available to defendants previously sentenced as of the same date as the defendant now at issue, the defendant could plausibly look to that reduced maximum as stating the law applicable to his previous conviction." U.S. Br. 18 n.5. Under the government's construction of § 924(e)(2)(A)(ii), therefore, a federal court must always look to the current sentencing law of a state to determine whether or not that law is retroactive. The fact that the court may ultimately opt for the old law does not preclude the need first to rule out the

relevance of the current law to the penalty the state prescribes for an offense. As with the Fourth Circuit's rule, the government's approach has the potential to embroil federal courts in the complexities of state retroactivity policies. Inevitably, as evidenced in the differing conclusions about the relevance of retroactivity in *Morton*, inconsistent interpretations of state law will arise. Pet. Br. 34-35 (citing *Hinojosa*, 348 F.3d at 205 and *Darden*, 539 F.3d at 123, n.9). In turn, conflicting interpretations will result in the arbitrary imposition of ACCA's severe penalties.

As noted above, a retroactivity-based approach makes the offense date the critical factor in determining whether a drug offense is serious for purposes of ACCA. As a result, in cases where two defendants appear before the same federal court and have the exact same drug offense, one committed a day before the effective date of a state's current law and the other on that date, the court will have to say the same offense both is and is not "serious." The result is not only contradictory logically, it requires the disparate imposition of ACCA's severe penalties.

B. Petitioner's Approach To The "Serious Drug Offense" Determination Is Simple And Fair.

Unlike the government's retroactivity-based approach, Petitioner's straightforward application of the plain meaning of the "serious drug offense" definition permits a court to simply look to current state law to determine whether a prior drug offense is a "serious" one or not. Taking a state's current sentencing law as the sole source of the "serious drug offense" determination ensures a unified standard for federal courts to apply and gives meaningful deference to a state's judgments about offense severity.

The government characterizes Petitioner's reading of § 924(e)(2)(A)(ii) as being "a hypothetical inquiry" that asks what sentence a defendant would receive "if his prior offense had not been committed until the time of his federal sentencing." U.S. Br. 41. In fact, Petitioner would require a court to take two simple steps: (1) identify the generic offense; and (2) look to a state's current law to determine the maximum imprisonment term prescribed for that offense. This approach, unlike the government's, does not require a court to sort through a state's retroactivity policies to determine which version of a state law controls; retroactivity is simply irrelevant under Petitioner's reading of the statute.

The government believes applying the current state penalty to a prior conviction "presents considerable potential difficulties" if a state reformulates a defendant's prior offense between the conviction and the federal sentencing proceeding. U.S. Br. 27. As an initial observation, it does not appear that such reformulations occur frequently, as the government has cited only two cases from almost ten years ago that presented this situation. U.S. Br. 27-28 (citing *United States* v. *Allen*, 282 F.3d 339 (2002); *Mallett* v. *United States*, 334 F.3d 391 (6th Cir. 2003)). And, regardless of frequency, the same difficulties would apply under the government's retroactivity-based approach where the current law retroactively applied to old, re-formulated offenses. More important, in cases where a federal court cannot categorically determine that a prior offense is "serious," and therefore decides that ACCA cannot apply, that court could still imprison the defendant for up to ten years under § 922(g)(1).

Finally, the government asserts that Petitioner's reading leads to "troubling" results if the federal

sentencing date rather than the federal offense date provides the point at which to measure the seriousness of a predicate drug offense. U.S. Br. 30; see also U.S. Br. 19 n.6 (noting that amici contend the seriousness of a predicate offense is measured at the time of the federal offense, citing NACDL Amicus Br. 5). While Petitioner has proposed the federal sentencing date as the proper time to determine whether a prior conviction is for a predicate serious drug offense, using the date of the defendant's federal firearm violation would also comport with the plain meaning of the statute. In fact, at oral argument in the court below, Petitioner suggested that the date of the § 922(g)(1) offense could be the relevant time to assess the seriousness of a prior drug offense. See *United States* v. *McNeill*, No. 09-4083, Pet. Rehrg. *En Banc*, at 14, (4th Cir. Mar. 22, 2010). Pegging the term of imprisonment "prescribed by law" to the date of the federal offense, rather than the date of the federal sentencing hearing, erases the government's concern for the similarly-situated defendants it hypothesizes. In contrast, all of the problems arising from using the date of the state offense, the reading advocated by the government, remain.

CONCLUSION

This Court should reverse the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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